United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

No. 77-7109

In the

United States Court of Appeals

For the Second Circuit

DAVID BECKER and MARGARET B. LEDDER, *Plaintiffs-Appellants,* *vs.* SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION, *Defendants-Appellees.*	Appeal from the United States District Court for the Southern District of New York. — Honorable **Constance Baker Motley,** Judge Presiding.

JOINT APPENDIX.

Volume II.

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID BECKER and MARGARET B. LEDDER, Plaintiffs,	:	72 Civ. 2370 (C.B.M.)
- against -	:	STATEMENT OF DEFENDANTS PURSUANT TO GENERAL RULE 9(g) AS TO FACTS NOT IN DISPUTE
SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION, Defendants.	:	

---x

Defendants respectfully submit the following statement of material facts as to which it is contended that there is no genuine issue to be tried:

1. This action has been declared by the Court not to be a class action by opinion dated September 19, 1975. Therefore, the only remaining claim is that of the individual plaintiffs.

2. The complaint seeks only money damages, and does not seek equitable relief.

3. The complaint seeks total money damages of $18,000,000 for the 2,742,450 minority shares of BHM Industries, Inc. formerly outstanding. Thus, the complaint seeks damages of $6.56 for each share of BHM Industries, Inc. stock.

4. Plaintiffs formerly held 500 shares of stock of BHM Industries, Inc. Therefore, the total amount of damages claimed by plaintiffs come to $3,280.00, determined by multiplying $6.56 per share by the 500 shares formerly owned by plaintiffs.

5. Plaintiffs have been tendered payment of the full amount of the aforesaid damages which they claim, in addition to 6% interest per annum from the date of the merger referred to in the complaint.

DATED: New York, New York
October 6, 1975

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------------------x

DAVID BECKER and
MARGARET B. LEDDER,

Plaintiffs,

72 Civ. 2370 (C.B.M.)

- against -

AFFIDAVIT

SCHENLEY INDUSTRIES, INC.,
GLEN ALDEN CORPORATION and
RAPID AMERICAN CORPORATION,

Defendants.

---------------------------------------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARC P. CHERNO, being duly sworn, deposes and says:

1. I am a member of the firm of Fried, Frank, Harris, Shriver & Jacobson, attorneys for defendants Schenley Industries, Inc., and Glen Alden Corporation in the above matter. I make this affidavit in support of defendants' motion for summary judgment dismissing the complaint in the above entitled action on the grounds that this action is now moot, or alternatively, for a stay of proceedings in this action.

2. In this shareholders' action, this Court denied plaintiffs' motion for a class action determination in a memorandum opinion dated September 19, 1975. (A copy of the court's opinion is annexed hereto as Exhibit "A").

The Court ordered trial to proceed on plaintiffs' individual claims on October 8, 1975 or on 24 hours' notice.

3. As this Court pointed out in its decision on the class action motion, a class action, consolidated under the lead case of Cole v. Schenley Industries, Inc., 71 Civ. 1028, and encompassing the claims of plaintiffs in the present case, is scheduled for trial in October of 1975. In fact, trial of the Cole case is scheduled to commence on October 14.

4. Defendants believe that the present action is completely unfounded, and is being maintained solely in an effort to coerce a settlement. Defendants also believe that they should not be required to litigate the same issues twice, and that it makes no sense to burden the Court or the litigants with a lengthy trial whose expense will be many times greater than the amount at issue. Therefore, in order to avoid the "unnecessary drain on the resources of the court and litigants" and "the likelihood of inconsistent outcomes" noted by the Court in its decision, and to finally dispose of this vexatious and already expensive litigation, defendants have offered to pay to plaintiffs the full amount of their claim, plus interest.

5. Plaintiffs' counsel has refused to accept this payment in full, and has insisted upon proceeding to trial on the individual claims, thus seeking to require

defendants to litigate, and the Court to consider, the same issues twice. Therefore, while, as noted, defendants believe plaintiffs' claims to be utterly without merit, defendants, by letter dated October 6, 1975 (annexed hereto as Exhibit "B") have tendered to plaintiffs a check for $4,428.00 This represents a principal payment of $3,280.00, determined by dividing the total amount of plaintiffs' proposed class claim, $18,000,000, as set forth in their amended complaint (annexed hereto as Exhibit "C"), by the number of minority shares of BHM Industries, Inc., formerly outstanding (2,742,450), and multiplying the result ($6.56 per share) by the number of shares formerly held by plaintiffs, 500. In addition, interest at 6% per annum from the date of the merger in question, December 15, 1969, to the date of tender has been added.

6. Since the complaint seeks only monetary damages, and plaintiffs have now received all of the damages they have requested and could conceivably be entitled to, this action is now moot and plaintiffs no longer state a claim upon which relief can be granted. Therefore, it is respectfully requested that defendants' motion for summary judgment dismissing the complaint be granted.

7. Alternatively, it is respectfully requested that proceedings in this action be stayed pending determination

of the Cole case. We submit that defendants should not be required to engaged in two lengthy litigations of the same issues twice -- both against a class of over 2,500,000 shares in Cole and against the individual plaintiffs in the present case -- and that to require this will result in the very "unnecessary drain on the resources of the court and the litigants" with the "likelihood of inconsistent outcomes" that this Court seeks to prevent. Furthermore, as noted, the expense of trial in the present case will be many times greater than the amount at issue.

8. Moreover, plaintiffs in the present case themselves are included within the class designated in Cole; they have never claimed to have elected not to be included in that case, and our records do not indicate that they have so elected. Therefore, plaintiffs, like defendants, are actually litigating the issues in question in the Cole case, so that permitting the present action to proceed would not only result in the duplicative litigation and determination of the same issues, but, in fact, in the duplicative determination of the same issues between the same parties.

9. No prior request for the relief requested has been made.

Therefore, it is respectfully requested that defendants' motion for summary judgment dismissing

the complaint, or alternatively, for a stay of proceedings in this action, be granted in all respects.

Marc P. Cherno

MARC P. CHERNO

Sworn to before me this 6th

day of October, 1975

Patricia A. Singleton

PATRICIA A. SINGLETON
Notary Public, State of New York
No. 31-4537018
Qualified in New York County
Commission Expires March 30, 1977

Copy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED
SEP 19 1975
S.D. OF N.Y.

- x

DAVID BECKER and MARGARET B. LEDDER, :

Plaintiffs, :

:

-against- : 72 CIV. 2370

:

SCHENLEY INDUSTRIES, INC., :
GLEN ALDEN CORPORATION and :
RAPID AMERICAN CORPORATION,

Defendants. :

- -

#43093

APPEARANCES

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CONSTANCE BAKER MOTLEY, D. J.

Memorandum Opinion and Order
on
Class Action Certification

After a complex procedural history, plaintiffs have once again moved for class action certification. Defendants have vigorously — and in the court's view persuasively — opposed the motion.

This is an action brought on behalf of the 47.3% minority shareholders of BHM Industries, Inc. ("BHM"), who exchanged their BHM shares for shares of $1.40 cumulative convertible preferred stock of Schenley Industries, Inc. pursuant to the merger of BHM into Schenley on December 15, 1969. The court notes that following the BHM-Schenley merger, plaintiffs retained their Schenley preferred shares until after February 1971, when they exchanged those shares for cash and debentures of Glen Alden Corporation, pursuant to a merger involving Schenley and Glen Alden.

The complaint charges violations of 10(b) and 14(a) of the Securities Exchange Act of 1934. Plaintiffs claim that certain false and misleading statements were

made in, and material facts omitted from, the proxy statement of November 1969 which proposed a merger of BHM into Schenley Industries, Inc.

Plaintiffs have moved to have this case declared a class action under Fed. R. Civ. P. 23(b)(3). The class which plaintiffs seek to represent is defined as those shareholders of BHM who, after exchanging their BHM shares for Schenley stock, sold their Schenley preferred stock prior to February 24, 1971. As noted above, plaintiffs are non-selling shareholders. They retained their Schenley shares after February 1971 and indeed thereafter exchanged the Schenley shares in accordance with the terms of the Schenley-Glen Alden merger. In the court's view, plaintiffs do not appear to be members of the class which they purport to represent. Further, plaintiffs and the selling shareholder class, as it has been defined, may well have different if not adverse interests in the conduct of this litigation. It is, of course, axiomatic that a shareholder cannot represent a class of which he or she is not a member. Weisfeld v. Spartans Industries, Inc., 58 F.R.D. 570, 582 (S.D.N.Y. 1972).

Puharich v. Borders Electronics Co., CCH Fed. Sec. L. Rep. ¶ 92,160 at p. 96,730 (S.D.N.Y. 1968). For this reason, the court denies plaintiffs' class action motion under their definition of the class.

Finally, the court does not feel that granting class action status to a class differently defined, and one of which plaintiffs would concededly be members, would be appropriate. The court notes that the five actions commenced in the spring of 1971 and consolidated under the lead case of Cole v. Schenley Industries, Inc., 71 Civ. 1028, encompass both the claims of plaintiffs here and the only class which plaintiffs could represent. More specifically, paragraph 17 of the complaint in Stiller v. Smith, 71 Civ. 1536, one of the constituent actions consolidated in Cole, indicates that the plaintiffs in Stiller are in the identical position as plaintiffs here -- former stockholders of BHM who exchanged BHM shares for Schenley preferred shares and later exchanged Schenley shares in the Schenley-Glen Alden merger. Further, paragraphs 22(b) and 32(b) of the amended complaint in Cole make clear that, as here, the BHM-Schenley merger and proxy statement are in issue in Cole. Since class action status has already been granted

in Cole (60 F.R.D. 81 [S.D.N.Y. 1963]), the court concludes that the maintenance of the instant case as a class action would be duplicative and inconsistent with the objectives of Fed. R. Civ. P. 23(b)(3).

A class action may be maintained under Rule 23(b)(3) when the court is satisfied that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Among the factors to be considered by the court is "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." Fed. R. Civ. P. 23(b)(3)(B). It is the court's opinion that a class action would not be the superior method of resolving the instant case. In view of the fact that Cole is scheduled for trial before Judge Owen in October 1975, maintenance of a class action here would be an unnecessary drain on the resources of the court and the litigants. Further, duplicative class actions increase the liklihood of inconsistent outcomes. Blecker v. Lazard Freres & Co., CCH Fed. Sec. L. Rep. ¶94,306, at p. 95,032 (S.D.N.Y. 1973), reargument denied, CCH Fed. Sec. L. Rep. ¶94,393 (S.D.N.Y. 1974). If plaintiffs consider their interests inadequately

protected by the Cole litigation, as members of the Cole class, plaintiffs may apply to intervene in that case.

For the reasons noted above, the court denies plaintiffs' motion for class action certification. In view of the foregoing, the court directs the parties to submit a jointly prepared proposed pre-trial order by October 8, 1975 and to be prepared for trial on October 8, 1975, or on 24 hours' notice thereafter.

Dated: New York, New York

September 19, 1975 SO ORDERED

CONSTANCE BAKER MOTLEY
U. S. D. J.

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210

PAY [illegible] DOLLARS

TO THE ORDER OF David Becker & Margaret B. Fedder & [illegible], Farrell & Mackrae attorneys

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COUNSEL

October 6, 1975

OUR REFERENCE
9510-38

<u>BY HAND</u>

Gold, Farrell & Marks, Esqs.
595 Madison Avenue
New York, New York

Re: Becker & Ledder v.
<u>Schenley Industries, Inc.</u>

Gentlemen:

Although we believe plaintiffs' claims in this action to be wholly without merit, in order to avoid duplicative litigation, and further expense which far outweighs the amount at stake herein, we enclose herewith our firm's check in the amount of $4,419.00 in full payment of your clients' claims.

This represents a principal payment of $3,280.00, determined by dividing the total amount of the alleged damages mentioned in the complaint, $18,000,000, by the number of minority shares of BHM Industries, Inc., formerly outstanding (2,742,450) and multiplying the result ($6.56 per share) by the number of shares formerly held by your clients, 500 shares. In addition, interest at 6% per annum from the date of the merger, December 15, 1969, to the date of tender has been added.

If there is any error in these computations, please let me know and it will be rectified.

Very truly yours,

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON

By Marc P. Cherno
Marc P. Cherno

MPC:jdg

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--------------------------------------x

DAVID BECKER and MARGARET B. LEDDER, :

Plaintiffs, :

-against- :

SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID-AMERICAN CORPORATION, :

Defendants. :

--------------------------------------x

AMENDED COMPLAINT

72 Civ. 2370

(CHT)

Plaintiffs, by their attorneys, allege as follows:

FIRST CAUSE OF ACTION

1. This action is brought under Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 (15 U. S. C. §§78j(b) and 78n(a) and Rules 10b-5 ~~and~~ 14a-9 promulgated thereunder. This Court has jurisdiction of this action under Section 27 of said Act (15 U.S.C. §78aa).

2. Plaintiffs each are now and at all times material herein were residents of Cook County, Illinois. Prior to November 17, 1969, Plaintiffs were the owners respectively

of 400 and 100 shares of BHM INDUSTRIES, INC. ("BHM").

3. Prior to November 17, 1969, BHM was a corporati organized under the laws of Delaware. Through its wholly owned subsidiary, Buckingham Corporation, BHM was engaged in the business of importing and distributing Cutty Sark Scotch Whiskey. Buckingham Corporation is the sole importer of Cutt Sark Scotch Whiskey in the United States under an agreement with the foreign distiller which expires January 1, 2000. Fo the years ended December 31, 1968 and 1969 Buckingham Corporation had net income of approximately $9 million and $9.6 million, respectively. As of November 17, 1969, BHM had cash and short-term investments totalling approximately $34,000,00

4. As of November 5, 1969, the outstanding securities of BHM consisted of 5,796,900 shares of common stock. Of these, 3,054,450 shares or approximately 52.7% were owned by Defendant SCHENLEY INDUSTRIES, INC. ("Schenley"). On May 15, 1969, Schenley had caused the election of all of the directors of BHM.

5. At all times material herein, Defendant, GLEN ALDEN CORPORATION, owned a majority of the outstanding common stock of Schenley, and Defendant RAPID-AMERICAN CORPORATIO owned a majority of the outstanding common stock of Glen Alden Corporation. At the time of the statutory violation hereinaf

alleged, Defendants, GLEN ALDEN CORPORATION and RAPID-AMERICAN CORPORATION were each controlling persons of Schenley within the provisions of Section 20 of the Securities Exchange Act of 1934 (15 U.S.C. §78t).

6. Under date of November 17, 1969, Schenley caused BHM to distribute, through the United States Mails, to Plaintiffs and the other independent shareholders of BHM, a proxy statement relating to a proposed merger of BHM into Schenley. Plaintiffs each received a copy of said proxy statement in Cook County, Illinois. A copy of said proxy statement is attached hereto as Exhibit A and is hereby made a part hereof.

7. Under the terms of the proposed merger, each shareholder of BHM (other than Schenley) would receive one share of $1.40 Cumulative Convertible Preferred Stock of Schenley in exchange for one share of common stock of BHM. Schenley would receive all of the assets of BHM, including all of the outstanding shares of Buckingham Corporation and approximately $34,000,000 in cash and short-term investments.

8. The $1.40 Cumulative Convertible Preferred Stock of Schenley to be issued in the proposed merger had a value of approximately $20 per share. For purposes of the

BEST COPY AVAILABLE

merger, the aggregate value ascribed to the 47.3% equity in BHM owned by the independent shareholders thereof was approximately $54,849,000, and the aggregate value ascribed to the total equity in BHM, including its aforesaid cash and short-term investments, was approximately $115,938.000.

9. The proxy statement issued in connection with said merger, and pursuant to which the merger was ultimately approved by shareholders of BHM, was false and misleading. It omitted to state the true value of Buckingham Corporation, BHM's wholly owned subsidiary. Although the proxy statement (p.5) purported to inform the shareholders that Buckingham Corporation may have a higher value than that represented in the proxy statement, there was no disclosure at all that in fact Buckingham alone then had a higher value than that ascribed in the proxy statement to all of BHM.

10. The merger was approved and consummated in December, 1969. Approximately ten months later, Schenley entered into a memorandum agreement with Northwest Industries, Inc., a Delaware corporation, to sell to it all of the outstanding shares of Buckingham Corporation for a price of $120,000,000. At that time there had been no material change in the financial condition of Buckingham Corporation since the merger. On May 10, 1971, the memorandum agreement was supplanted by a definitive stock purchase agreement which

recited an effective consummation date of April 30, 1971. Under the terms of this agreement, Schenley received $103,000,000 in cash and $17,000,000 in 9-1/2 per cent notes due in 1979 for all of the shares of Buckingham Corporation.

11. As a result of its acquisition of BHM for an effective price of approximately $116,000,000, its retention of BHM's cash and short-term investments of approximately $34,000,000, and the aforesaid sale of the shares of Buckingham Corporation to Northwest Industries, Schenley realized a profit of approximately $38,000,000. Schenley, through its aforesaid scheme, thus defrauded the former minority shareholders of BHM out of 47.3% of said $38,000,000, or approximately $18,000,000.

12. The aforesaid conduct of Schenley was in violation of Sections 14(a) and 10(b) of the Securities Exchange Act of 1934 and Rules 14a-9 and 10b-5 thereunder.

13. Plaintiffs bring this action on behalf of themselves and pursuant to Rule 23 of the Federal Rules of Civil Procedure as a class action on behalf of all other former minority shareholders of BHM similarly situated to Plaintiffs. Such persons constitute a class so numerous that joinder of all members is impracticable. There are

questions of law or fact common to the class. The claims of Plaintiffs are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class.

SECOND CAUSE OF ACTION

14. Repeat and reallege paragraphs 1 through 13 hereof.

15. The proxy statement issued by Schenley and BHM on November 17, 1969 was false and misleading in that:

A. The proxy statement fails to disclose that advice was rendered to the Board of Directors of BHM by White Weld & Company which recommended that the proposed merger was fair to the BHM minority shareholders on the basis of the fact that the minority shareholders would be receiving a premium on the value of their shares of approximately 13.9 per cent, and that this premium did not exist when the proxy statement was issued or the merger consummated.

B. The proxy statement fails to disclose that the Schenley Board of Directors formally resolved, at a meeting of June 24, 1969, that the value of the 47.3% minority interest in BHM to be received by Schenley on the merger was $68,570,111, which was approximately $14,000,000 more than the value ascribed

to that minority interest in the proxy statement and the price actually paid by Schenley on consummation of the merger.

C. The proxy statement failed to disclose that, prior to the issuance of the proxy statement, Schenley had formally submitted to the Antitrust Division of the United States Department of Justice a proposed consent decree in United States of America v. Schenley Industries, Inc. and the Buckingham Corporation, a government divestiture action then pending in the United States District Court for the Southern District of New York, and that such consent decree, *inter alia*, obligated Schenley to sell Buckingham no later than October, 1972.

16. The failure to disclose the facts contained in paragraphs 15 A, B and C, in each instance, constituted material omissions from the proxy statement which were misleading and which made other statements contained in the proxy statement misleading, in violation of Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 and Rules 14a-9 and 10b-5 thereunder.

WHEREFORE, Plaintiffs pray:

1. That this Court enter judgment on each cause of action against Defendant SCHENLEY INDUSTRIES, INC.,

GLEN ALDEN CORPORATION and RAPID-AMERICAN CORPORATION, and each of them, and in favor of Plaintiffs and the class of former shareholders of BHK INDUSTRIES, INC. represented herein by Plaintiffs in the amount of $18,000,000, plus interest, reasonable attorneys' fees and the costs of this action.

2. That this Court grant such other and further relief as may be required.

GOLD, FARRELL & MARKS

By: [signature]

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID BECKER and MARGARET B. LEDDER, Plaintiffs,	
-against-	72 Civ. 2370 (CBM)
SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION, Defendants.	NOTICE OF CROSS-MOTIO

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Leonard M. Marks, sworn to October 15, 1975, and upon the prior proceedings herein, plaintiffs will move this Court at Room 1106, United States Courthouse, Foley Square, New York, New York, on October 27, 1975, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order, pursuant to Fed. R. Civ. P. 23(c)(1), altering this Court's prior order dated September 19, 1975, which denied class action status to this case, and certifying the case as a class action, and for such other and further relief as the Court may deem just and proper.

October 15, 1975

GOLD, FARRELL & MARKS

By ______________________
A Member of the Firm
Attorneys for Plaintiffs
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TO: FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
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& FRIEDMAN
Attorneys for Defendant Rapid
American Corporation
645 Fifth Avenue
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID BECKER and MARGARET B. LEDDER, Plaintiffs, -against- SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION, Defendants.	72 Civ. 2370 (CBM) STATEMENT OF PLAINTIFFS PURSUANT TO GENERAL RULE 9(g) AS TO FACTS IN DISPUTE

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1. Plaintiffs deny the statement in defendants' Rule 9(g) Statement that "the only remaining claim is that of the individual plaintiffs," and plaintiffs admit the remaining statements of fact not in dispute in defendants' 9(g) Statement.

2. Plaintiffs contend that the following are genuine issues of fact:

(a) Whether the determination of the case entitled Cole v. Schenley Industries, Inc., 71 Civ. 1028, will adequately protect the rights of the minority shareholders of BHM Corporation ("BHM") as of December 15, 1969, the date upon which BHM was merged into Schenley Industries, Inc. ("Schenley").

(b) Whether the BHM-Schenley merger constituted a fraud upon the BHM minority shareholders and was the result of a proxy statement dated November 14, 1969, which was false and misleading in violation of the securities laws of the United States.

October 15, 1975

GOLD, FARRELL & MARKS
Attorneys for Plaintiffs
595 Madison Avenue
New York, New York 10022
(212) 935-9200

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID BECKER and MARGARET B. LEDDER, Plaintiffs,	:	72 Civ. 2370 (CBM)
-against-	:	
SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION AND RAPID AMERICAN CORPORATION, Defendants.	:	AFFIDAVIT

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LEONARD M. MARKS, being duly sworn, deposes and says:

1. I am a member of Gold, Farrell & Marks, attorneys for plaintiffs in the within action. I make this affidavit: (a) in support of a motion by plaintiffs for renewal, reconsideration and reargument of the decision and order of this Court dated September 19, 1975 which denied class action status to the case; (b) in opposition to defendants' motion to dismiss this action as moot; and (c) in opposition to defendants' alternative motion for a stay of this action.

2. In denying class action status to this case, the Court relied upon the pendency of Cole v. Schenley Industries, Inc 71 Civ. 1028, a consolidated action which is presently being tried in this district before Judge Owen. The Court noted that two subparagraphs in the amended complaint in Cole referred to the BHM-Schenley merger and proxy statement. The Court also indicated that the plaintiffs' position as former shareholders of

BHM who exchanged BHM shares for Schenley shares (and thereafter Schenley shares for Glen-Alden shares) is the same as that alleged in paragraph 17 of the complaint in Stiller v. Smith, 71 Civ. 1536, one of the constituent actions consolidated in Cole.

3. Finding that a part of the proposed class in the present case is also a part of the class in Cole, and that the allegations in the present action are a part of the Cole case, this Court denied class action status to the present action, concluding that "the maintenance of the instant case as a class action would be duplicative and inconsistent with the objectives of Fed. R. Civ. P. 23(b)(3)."

4. A recent examination of the court file in Cole, however, indicates that the proposed class members in the present case and the allegations of the complaint herein are not being litigated in Cole at all. Thus, the pretrial order in Cole does not discuss the facts of the present case, and the issues to be tried specified in the pretrial order do not include the issues in the present action. In the Cole pretrial order, the plaintiffs do not include any claim or seek a determination that the minority shareholders of BHM, whom plaintiffs seek to represent, were defrauded in the BHM-Schenley merger on December 15, 1969.

5. Under Rule 16 of the Federal Rules of Civil Procedure, the pretrial order in Cole supersedes the pleadings and limits the issues at trial. Case v. Abrams, 352 F.2d 193, 195 (10th Cir. 1965); Rompe v. Yablon, 277 F. Supp. 662 (S.D.N.Y. 1967); 3 Moore, Fed. Practice, ¶16.19. Thus, the allegations contained in paragraph 17 of the Stiller v. Smith complaint and the references in the Cole complaint to the BHM-Schenley merger upon which the Court relied in denying class action status, are

no longer part of the Cole action.

6. In addition, we have examined the lengthy trial memoranda submitted by the parties in Cole after the decision by this Court denying class action status on September 19, 1975. The issues in the present action are not discussed by any party in Cole. As contained in their pretrial memorandum, the Cole plaintiffs allege only that the proxy statement with respect to the 1971 Schenley-Glen Alden merger was misleading in five ways:

A. Schenley had $115 million in "surplus-surplus" cash which it transferred to Glen-Alden and which could have been distributed as dividends to Schenley shareholders. The existence of the "surplus-surplus" is alleged to be a significant factor in evaluating Schenley.

B. Glen-Alden fixed the value of Schenley shares for purposes of the merger at $29 (common) and $26.10 (preferred), while it valued its own holdings of Schenley common at $62.70.

C. Glen Alden issued its debentures in return for Schenley's cash and these debentures were used to acquire the Schenley minority shares. However, it is alleged that the cash was to be used immediately to pay Glen-Alden's debts, thereby undermining the real value of the debentures.

D. The Schenley financial statements in the proxy statement significantly underestimated

Schenley's past, current and expected income.

E. Glen-Alden knew that the Schenley-Glen-Alden merger was unfair to the Schenley minority on the basis of an undisclosed opinion from Allen & Co., one of its investment bankers.

7. These are not the issues to be tried in this case. The Cole plaintiffs do not in any way challenge the validity of the 1969 BHM-Schenley merger, they do not claim that that merger was unfair to the BHM minority, and they nowhere raise any of the following issues which are the crux of this case:

(a) The basic theory of liability, that defendants knew or should have known that Buckingham was worth substantially more than the price paid at the time of the BHM merger, and that defendants intended to resell Buckingham for more than they paid for all of BHM as soon as possible after the BHM merger.

(b) The facts and theories concerning the "advice" from Loeb Rhoades about the merger, showing that control persons of defendants had planned the fraudulent sale of Buckingham before the merger was even proposed.

(c) The existence of Schenley's proposed antitrust divestiture decreee, also revealing defendants' intentions.

(d) The advice from White Weld concerning the fairness of the merger to the BHM minority on the basis of factors which had disappeared by the time the merger was consummated.

(e) The existence of the Schenley Board resolution that the value of the BHM merger was $14 million more than Schenley paid on the merger.

(f) The undisclosed contacts between Schenley and Northwest in June 1969 regarding the possible sale of Buckingham, the payment of a broker's fee by Northwest for work done in 1969 in connection with the ultimate sale of Buckingham to Northwest, the immediate search for purchasers after the merger, and the quick sale to Northwest.

(g) The negotiations between Schenley and numerous potential purchasers after the merger revealing defendants' insistence on a selling price of $38 million above the price paid in the merger, again demonstrating defendants' knowledge of the value of Buckingham before the merger.

8. Since the sole basis for the Court's disallowance of class action status to this case has disappeared by recent events which have occurred in Cole, it is respectfully requested that the Court reconsider its denial of class action certification and permit the action to proceed as a class action. Rule 23(c)(1) provides that a class action determination may always be altered or amended before the decision on the merits. Plaintiffs are clearly representative of the minority shareholders of BHM who received the fraudulent proxy statement in November 1969 which was issued in connection with the merger of BHM into Schenley on December 15, 1969. The BHM minority shareholders are a readily identifiable class whose injury was complete when the fraudulent merger was consummated and they were deprived of their $18 million share of the true value of BHM. What the BHM minority shareholders did with the Schenley stock they were forced to accept on this merger is irrelevant since their injury was complete at the time of the merger.

IN NO EVENT IS THE PRESENT CASE MOOT

9. Regardless of whether the Court grants class action status to this case, plaintiff are entitled to and demand a judgmen on the merits. It is of no moment to plaintiffs whether that judgment be after trial or on defendants' default as long as judgment is on the merits.

10. Defendants are anxious to avoid such a judgment and to unilaterally and finally silence the individual plaintiffs in the present case, who possess uncontrovertible evidence of defendants' $18 million fraud against the plaintiffs' class. Defendants' method of attempting to gag the individual plaintiffs is by tendering their individual damages of $4,428 and then seeking a judicial determination dismissing the complaint, on the theory that the action has become moot by defendants' acts.

11. There is simply no legal authority for a defendant to render a class action moot by paying the claims of the individual plaintiffs who wish to proceed. Defendants have cited no case permitting such an extraordinary procedure in a class action, nor has our research uncovered any such authority.

12. Such a procedure would allow class action defendants to avoid any significant liability by payment to individual plaintiffs before there is a final determination of class action status. It would emasculate the purposes of the class action rule. Indeed, the most closely analagous cases in the class action area have repeatedly allowed the case to proceed to judgment on the merits, followed by an appeal from that final judgment on the class action question, along with any other appealable issues. Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), cert. denied, 89 S.Ct.

1194 (1969); Galvin v. Levine, 490 F.2d 1255, 1260-61 (2d Cir. 1963); 28 USC §1291. It has repeatedly been held that a class action may continue even if the claims of the individual plaintiffs became moot after the action was commenced. Sosna v. Iowa, ________U.S.______, 95 S.Ct. 553 (1975); Rosario v. Rockefeller, 410 U.S. 752, 756 n.5, 93 S.Ct. 1245, 1249 (1973); Dunn v. Blumstein, 405 U.S. 330, 333 n. 2, 92 S.Ct. 995, 998 (1972); Moore v. Ogilvie, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494 (1969); So. Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515, 31 S.Ct. 279 283 (1911).

13. Defendants have available to them a simple, expeditious method of avoiding the trial in this action contained in Fed. R. Civ. P. Rule 68, which provides, in relevant part:

> "At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment."

14. There does not appear to be any other federal rule or any class action case which allows the procedure defendants seek to impose here. Plaintiffs are willing to accept a judgment on the merits, to be followed by an appeal on the class action status. But defendants will not take such an established route. The real reason they have made this motion rather than proceed to trial is that they know that, unlike Cole, the plaintiffs here have hard facts and documentary proof that the BHM-Schenley merger was a knowing fraud on the BHM minority.

15. Moreover, it should be noted that the payment of $4,428 proposed by defendants would leave the individual plaintiffs with nothing. Since plaintiffs undertook this action with the expectation that the large costs would be divided among the class, to force them to abandon their suit at this juncture would mean that they would be solely responsible for payment of the tens of thousands of dollars of time worked by their counsel and the expensive disbursements incurred in prosecuting the suit to date.

16. A class action case involves more than just an issue of whether an individual plaintiff will receive the damages he claims. It also involves the determination that the same substantive wrong (common questions of law and fact) affected a large class of persons in the same relationship to defendants. Payment of the individual plaintiff's damages does not resolve the second and probably more significant issue.

17. None of the cases cited by defendants deal with class actions. Moreover, in each of defendants' citations, the entire controversy between the parties was actually decided and the courts determined that the additional issues raised in each case had been satisfactorily resolved before holding that the cases were moot. For example, in Lamb v. C.I.R., 390 F.2d 157 (2d Cir. 1968), the Court of Appeals dismissed as moot only after making a specific finding that the Internal Revenue Service would not make a similar assessment in a year subsequent to the year challenged by the taxpayer. This was precisely the additional substantive issue which had been the basis for the appeal and for petitioner's refusal to accept the tendered refund. Similar considerations prevailed in Drs. Hill & Thomas Co. v. United States, 392 F.2d 204 (6th Cir. 1968), and A. A. Allen Revivals, Inc. v.

Campbell, 353 F.2d 89 (5th Cir. 1965).

A STAY OF THIS ACTION
SHOULD NOT BE GRANTED

18. In the last branch of their motion, defendants belatedly seek a stay of this action. This is contrary to the clear direction of the Court that the parties submit a jointly prepared pretrial order and be prepared for trial immediately thereafter. There is no basis for any stay and the individual plaintiffs are entitled to a trial on the merits. Plaintiffs sought class action status at the outset of this action but defendants successfully insisted upon complete discovery before that determination was made. As a result, plaintiffs have spent hundreds of hours in pretrial discovery and have developed overwhelming proof of their substantive case as discussed in detail in prior submissions to this Court. Plaintiffs are ready for trial and their action should not be stayed. Rosenfield v. Integrated Service Industries Corp., CCH Fed. Sec. L. Rep. ¶92,701 (S.D.N.Y. June 29, 1970); Abrams v. Occidental Petroleum Corp., CCH Fed. Sec. L. Rep. ¶92,431 (S.D.N.Y. June 23, 1969); In re Penn Central Securities Litigation, 18 F. R. Serv. 2d 467, 470 (E.D.Pa. January 30, 1974).

19. Defendants' cases regarding a stay do not apply. In Levine v. American Export Industries, Inc., 473 F.2d 1008 (2d Cir. 1973), the Second Circuit held only that it did not have jurisdiction to entertain an interlocutory appeal from an order consolidating two actions "arising out of substantially the same facts." The appellants did not even challenge the stay of similar actions, since their action was not stayed in any way. Rosenfeld v. Schwitzer Corp., 251 F.Supp. 758 (S.D.N.Y. 1966),

granted a stay of a second derivative action because it made the same allegations as a pending Indiana action, and substantial dela would result from prosecution of a separate action in New York. Numerous cases have held that such delay is a weighty factor to be considered on a motion for a stay or consolidation. Cresta Blanca Wine Co. v. Eastern Wine Corp., 143 F.2d 1012 (2d Cir. 1944); Crosley Corp. v. Hazeltine Corp., 122 F.2d 925, 930 (3d Cir. 1941). See also Mattel, Inc. v. Louis Marx & Co., 353 F.2d 421 (2d Cir. 1965). But no such delay is involved in the present action in any way.

20. Similarly, in Schiff v. Metzner, 331 F.2d 963 (2d Cir. [illegible]), the plaintiff's derivative action was started six years after the main action against General Motors, alleging exactly the same wrong with respect to her stock; plaintiff had acquiesced in a five-year stay; and the only difference was that the original action included in the class all stockholders as far back as 1950 while plaintiff traced her stock back to 1936. Saemann v. Ernest & Jennings, International, 343 F.Supp. 457 (N.D. Ill. 1972), was not a class action. The prior litigation was begun three years earlier in England, the pretrial discovery in the United States litigation had barely begun, the English action would have to be stayed if the United States action was not stayed, the issues were essentially identical, and the main claim in the United States action (a preliminary injunction) was without merit.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the prior submissions to this Court concerning class action status, this case should be certified as a class action, and

defendants' motion to dismiss or for a stay of this action should be denied.

LEONARD M. MARKS

Sworn to before me this

15th day of October, 1975

[illegible]
Notary Public, State of New York
No. [illegible]
Qualified in Queens County
Commission Expires March 30, 1976

The within motion for reconsideration of this Court's prior decision of 9/19/75 denying class action status was heard on 1/14/77 and is again denied for the reasons set forth in that opinion

N.Y. N.Y.

1/14/77

So Ordered

Constance Baker Motley

USDJ

Microfilm Jan 18 1977

US District Court Filed Jan 18 1977 SD of N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID BECKER and
MARGARET B. LEDDER,

Plaintiffs,

- against -

SCHENLEY INDUSTRIES, INC.,
GLEN ALDEN CORPORATION and
RAPID AMERICAN CORPORATION,

Defendants.

U.S. DISTRICT COURT FILED JAN 18 1977 S.D. OF N.Y.

ORIGINAL

NOTICE OF MOTION, STATEMENT UNDER RULE 9(g)
AND AFFIDAVIT

The within motion to dismiss the action as moot on the ground that plaintiffs have been tendered their full claim for damages is granted on condition that defendants tender those damages within 10 days from the date of this order.
So Ordered.
Constance Baker Motley U.S.D.J.
N.Y. N.Y. 1/14/77

COPY RECEIVED

______________, 197_

GOLD, FARRELL & MARKS

BY ______________

Fried, Frank, Harris, Shriver & Jacobson

Attorneys for defendants Schenley Industries, Inc. and Glen Alden Corporation

120 Broadway

New York, N.Y. 10005

(212) 964-6500

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - x

DAVID BECKER and
MARGARET B. LEDDER,

Plaintiffs,

-against-

SCHENLEY INDUSTRIES, INC.,
GLEN ALDEN CORPORATION and
RAPID AMERICAN CORPORATION,

Defendants.

- - - - - - - - - - - - - - - - x

72 Civ. 2370 (C.B.M.)

JUDGMENT

RECEIVED
JAN 21 1977
JUDGE MOTLEY'S CHAMBERS

Defendants having moved to dismiss the complaint as moot, and an order having been made on January 14, 1977, granting the motion on the ground that plaintiffs have been tendered their full individual claims for damages, on condition that defendants retender those damages within 10 days from the date of said order, and it appearing from the affidavit of Marc P. Cherno sworn to January 20, 1977, that the condition has been fully complied with, it is

ORDERED, ADJUDGED and DECREED that the above entitled action is dismissed.

Dated: New York, New York
January , 1977.

JUDGMENT ENTERED

LAW OFFICES
JAMES S. GORDON
ONE IBM PLAZA
CHICAGO, ILLINOIS 606
TELEPHONE (312) 565-1177

January 20, 1977

Fried, Frank, Harris, Shriver & Jacobson
120 Broadway
New York, N.Y. 10005

Attention: Mr. Mark P. Cherno

Re: Becker & Ledder v. Schenley Industries, Inc.

Gentlemen:

On or about January 19, 1977, the undersigned and Edward Slovick, counsel for plaintiffs in the above captioned litigation received your letter of January 17, 1977 and your check for $4,675.00 enclosed therewith. You state that this check constitutes a retender of full payment of our clients' claims in the above captioned matter.

Please take notice that plaintiffs reject your tender, and accordingly do hereby return your check.

Plaintiffs do not agree with Judge Motley's decision declining to certify the above action as a class action, and consequently cannot agree that your tender to plaintiffs of the amount of their individual damages moots the case.

Very truly yours,

JAMES S. GORDON

JSG:LL
Enc.
cc: Mr. Martin E. Silfen

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID BECKER and
MARGARET B. LEDDER,

Plaintiffs, 72 Civ. 2370

-against-

SCHENLEY INDUSTRIES, INC.,
GLEN ALDEN CORPORATION and
RAPID AMERICAN CORPORATION,

Defendants.

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EXHIBIT TO
PLAINTIFF'S REPLY MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR A CLASS ACTION DETERMINATION

COMPLAINT

COLE v. SCHENLEY INDUSTRIES, INC.
71 Civ. 1028

SOUTHERN DISTRICT OF NEW YORK

---x

DOROTHY L. COLE, LOIS H. ZISOOK, HARRY W. VOEGE AND ANNA MAY TUNMORE, as Trustees, SAMUEL GREENFIELD FUND, INC., and HAROLD STILLER AND MILDRED STILLER, as joint tenants,

Plaintiffs,

-against-

SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION, RAPID-AMERICAN CORPORATION, ISIDORE A. BECKER, BERNARD GOLDBERG, PAUL A. JOHNSTON, DAVID A. CHERNOW, WALTER O. HEINZE, HOWARD FELDMAN, MILO B. HOPKINS, RUSSELL G. SMITH, ALBERT N. GREENFIELD, MESHULAM RIKLIS, GLEN ALDEN SUBSIDIARY, INC., P. J. CLIFFORD, W. P. JOHNSON, S. KITTAY, M. L. MENDELL, L. C. LANE, G. H. PERKINS and B. DENMARK,

Defendants.

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71 Civ. 1028

CLASS ACTION

CONSOLIDATED AMENDED COMPLAI

Plaintiffs Reques Trial By Jury

JURISDICTION AND CLASS ACTION ALLEGATIONS

1. (a) Jurisdiction of Counts I, III, IV and V of this complaint is founded on Section 27 of the Securities Exchange Act of 1934 (1934 Act) (15 U.S.C. §78aa) and arise under Sections 10(b) and 14(a) of the 1934 Act (15 U.S.C. §§78j and 78n(a)), and the Rules and Regulations of the Securities and Exchange Commission ("SEC") promulgated thereunder.

(b) Jurisdiction of Counts II and V of this complaint is founded in diversity of citizenship and amount. The amount in controversy exceeds, exclusive of interest and costs, the sum of TEN THOUSAND ($10,000) DOLLARS.

(c) Class Action Allegations: Counts I through IV of this complaint are properly maintainable as a class action under the provisions of F.R.C.P. Rule 23(b)3.

(i) On information and belief, there were approximately 9,000 persons who were the beneficial owners of $1.40 Cumulative Convertible Preferred Stock of defendant Schenley Industries, Inc. ("Schenley"), (hereinafter called "Schenley Preferred") and 7,000 persons who were the owners of the common stock of Schenley (hereinafter called "Schenley Common"), when a public announcement was made on February 25, 1971 of the terms of a proposed merger between defendant Glen Alden Corporation ("Glen Alden") and Schenley. Approximately the same number were the beneficial owners of Schenley Preferred and Common shares on May 10, 1971, the record date fixed by Schenley for the meeting of its stockholders that were entitled to vote on the proposed merger; and, on

June 17, 1971, the day of the stockholders' meeting and the day on which the merger was declared effective by Schenley and Glen Alden. In addition, there were a substantial number of owners of Schenley Preferred and Common shares as of February 24, 1971 or May 10, 1971 who, on or before June 17, 1971 were forced to sell and sold their shares in the open market because of the unfair, inadequate or otherwise unacceptable terms of the proposed merger. Such shares were sold through the facilities of the New York Stock Exchange at prices, which were artificially depressed by defendants to levels which represented about 40% to 50% less than the fair value of their shares at the time of sale and those sellers suffered loss accordingly, as stated in paragraphs 20 through 23 and paragraph 29 below. Between February 24, 1971 and June 17, 1971 approximately 360,400 shares of Schenley Common and 728,900 shares of Schenley Preferred were sold through the facilities of the New York Stock Exchange. Those sellers whose number are believed to be substantial, are known to defendants but not to plaintiffs, are members of Class II and Class IV hereinafter defined.

(ii) There are four groups or classes on

whose behalf this complaint is brought. Each consists of those persons and entities, other than defendants, who were:

(a) The beneficial owners of Schenley Preferred and Common shares on June 17, 1971, the effective day of the merger of Schenley and Glen Alden. Plaintiffs, Cole, Zisook, Greenfield, Voege, Tunmore and Harold and Mildred Stiller are representatives of this group (Class I).

(b) The beneficial owners of Schenley Preferred and Common stock on February 24, 1971 and who between February 25, 1971 and June 17, 1971 sold their shares through the facilities of the New York Stock Exchange (Class II).

(c) Those beneficial owners of Schenley Common shares on September 1, 1968 (the expiration date of the tender offer of Glen Alden set forth in a Prospectus dated August 8, 1968) who were the owners of such shares on June 17, 1971, (including their successors in interest by inheritance or by testamentary disposition) and who were the alleged third party beneficiaries of the contractual obligation of Glen Alden under a March 1968 agreement with Lewis Rosensteil, on whose behalf Count III of this complaint is

alleged to have been brought. Plaintiffs Voege and Tunmore are the representatives of this group (Class III).

(d) Those beneficial owners of Schenley Common on September 1, 1968 who were the owners of such shares on February 24, 1971 (including their successors in interest by inheritance or by testamentary disposition) and who were the alleged third party beneficiaries of the contractual obligation of Glen Alden under a March, 1968 agreement with Lewis Rosenstiel, on whose behalf Count III is alleged to have been brought and who sold such shares between February 25, 1971 and June 17, 1971 through the facilities of the New York Stock Exchange. Plaintiffs Voege and Tunmore are the representatives of this group (Class IV).

(iii) The members of each class are scattered throughout the United States and are so numerous as to make it impractical to bring them all before the Court. The representatives of each class and their counsel will fairly and adequately protect the interests of all members of each class. The claims of those representing each class are typical of the claims of the other members of the class.

(v) The claims of Class I and Class II involve common questions of fact which are set forth in paragraphs 16 through 33, 41 through 43 and 71 through 77 below. The questions of law common to the two

classes are, among others, whether Sections 10(b) or 14(a) of the 1934 Act and the Rules and Regulations of the SEC promulgated thereunder have been violated and whether the merger between Schenley and Glen Alden was fraudulent, unfair or constituted a breach of fiduciary obligation owed by defendants to the members of each class.

(vi) The claims of all members of Class III and Class IV involve common questions of fact which are set forth in paragraphs 47 through 65, below. The questions of law common to those classes are, in addition to those set forth above with respect to Class I and Class II, whether the members of each class at the time of the merger had been and were third party beneficiaries of the March 1968 agreement between Glen Alden and Lewis Rosenstiel and were entitled to receive $53 to $54 per share for their Schenley Common; and, whether Glen Alden is estopped from contending against those classes that the Schenley Common have a value of less than $53 to $54 per share by reason of Glen Alden having taken the position in another action that $53.33-1/3 represented the fair and reasonable value of the Schenley Common.

(vii) With respect to each class, a class action is superior to any other method available for the fair and efficient adjudication of the controversy.

THE PARTIES

2. Plaintiff(s):

(a) DOROTHY L. COLE ("Cole") is a citizen of the State of Florida. At all times since April 7, 1970 she has been and is now the owner, through purchase, of 500 shares of $1.40 Cumulative Convertible Preferred Stock of defendant Schenley Industries, Inc. ("Schenley Preferred"), described below.

(b) LOIS H. ZISOOK is a citizen of the State of Illinois. At all times since February 1970 she has been and is now the owner, through purchase, of 500 shares of Schenley Preferred.

(c) HARRY WALTER VOEGE ("Voege"), a citizen of the State of New York, and ANNA MAY TUNMORE ("Tunmore"), a citizen of the Commonwealth of Pennsylvania, have been and are still the owners and holders of the common stock of Schenley Industries, Inc. ("Schenley Common"), described below, as Trustees under the Last Will and Testament of Harry W. Voege, deceased, by appointment of the Surrogate's Court, Nassau County, wherein decedent resided at his death.

(d) SAMUEL GREENFIELD FUND, INC. ("Fund") is an open end no load mutual fund registered with the Securities and Exchange Commission. Fund is located at 25 Broad Street, New York, New York and is the owner of 1,000 shares of

Schenley Common. Fund has been a shareholder of Schenley Industries, Inc. since at least March of 1970.

(e) HAROLD STILLER and MILDRED STILLER, are the joint owners of 100 shares of Schenley Preferred. They are citizens of the State of New York.

3. Defendant(s):

(a) SCHENLEY INDUSTRIES, INC. ("Schenley"), is a corporation organized under the laws of the State of Delaware and has its principal place of business in the State of New York. The shares of Schenley Common and Schenley Preferred have been and are listed on the New York Stock Exchange.

(b) GLEN ALDEN CORPORATION ("Glen Alden"), is a corporation organized under the laws of the State of Delaware and has its principal place of business in the State of New York. Glen Alden owns 86% of the outstanding Schenley Common.

(c) RAPID-AMERICAN CORPORATION ("Rapid") is a corporation organized under the laws of the State of Ohio and has its principal place of business in the State of New York. Rapid is the owner of at least 64% of the outstanding common stock of Glen Alden and has been since at least March 14, 1969.

(d) GLEN ALDEN SUBSIDIARY, INC. is a corporation organized under the laws of the State of Delaware, has its principal place of business in the State of New York and is wholly-owned by Glen Alden.

4. Upon information and belief, each defendant named below is a citizen of a state other than the State of Illinois or Florida:

(a) Defendant ISIDORE A. BECKER ("Becker"), since at least January 1, 1968, has been and is now the Chairman of the Board and Chief Executive Officer of Schenley; a director and executive officer of Glen Alden, and of its parent, Rapid. Defendant Becker owns none of the outstanding shares of Schenley and receives no compensation from Schenley. He is the owner of 17,500 shares of Glen Alden common stock and is the beneficial owner of 63,362 shares of Rapid common stock. Defendant Becker is paid an annual salary of $100,000 by Glen Alden and $125,000 by Rapid and McCrory Corporation ("McCrory") which is a majority-owned subsidiary of Rapid, in addition to deferred compensation and retirement benefits.

(b) Defendant BERNARD GOLDBERG ("Goldberg"), since 1966, has been and is now a director and President of Schenley, who owns 9,002 shares of Schenley common, 15,000 shares of Glen Alden common stock and options to purchase

an additional 15,000 shares. He has reported that he owns 4,500 shares of Rapid common stock. Schenley currently pays defendant Goldberg an annual aggregate remuneration of $175,000 plus deferred compensation of $88,646.

(c) Defendant PAUL A. JOHNSTON ("Johnston") has been a director of Schenley since 1968, President and a director of Glen Alden since 1965, and has been a director of Rapid since 1969. He owns no outstanding shares of Schenley. He is the owner of 19,600 shares of Glen Alden common stock and an option to purchase an additional 35,000 shares and is the owner of 200 shares of Rapid common stock. Defendant Johnston receives an annual aggregate remuneration from Glen Alden of $255,275, plus deferred compensation of $25,000.

(d) Defendant DAVID A. CHERNOW ("Chernow") has been a director of Schenley since February 27, 1969 and is its Executive Vice President. He owns 1,500 shares of Schenley common and 500 shares of Rapid common stock and warrants to purchase an additional 1,000 shares. Schenley currently pays defendant Chernow an annual aggregate remuneration of $110,000.

(e) Defendant WALTER O. HEINZE ("Heinze") has been, since 1968, and is now a director of Schenley and is the President of International Latex Corporation, which had been a subsidiary of Glen Alden. He owns no shares of Schenley; has the right to purchase, before November 30, 1973, 5,500 shares of Class B Senior Cumulative Convertible ($3.00)

Preferred Stock of Glen Alden; has the right, under a stock option, to purchase 11,000 of such shares; and, he receives compensation from a subsidiary of Glen Alden.

(f) Defendant HOWARD FELDMAN ("Feldman") has been a director of Schenley since February 27, 1969 and owns 2,500 shares of Schenley Common. Schenley currently pays an annual aggregate compensation to Feldman of $155,080, plus deferred compensation of $40,000.

(g) Defendant MILO B. HOPKINS ("Hopkins"), since 1961, has been and is now a director of Schenley and owns 100 shares of Schenley Common. Schenley pays defendant Hopkins an annual consultant's fee of $31,750, plus deferred compensation of $20,000.

(h) Defendant RUSSELL G. SMITH ("Smith") since 1959, has been and is now a director of Schenley and owns no shares of Schenley Preferred or Common.

(i) Defendant ALBERT N. GREENFIELD ("Greenfield") has been a director of Schenley, since March 2, 1970, and was a director of McCrory, a subsidiary of Glen Alden. Defendant Greenfield owns no shares of Schenley. He owns 12,600 shares of Rapid common stock; warrants to purchase 8,800 shares of Rapid common stock and $238,000 principal amount of Rapid 5-3/4% Subordinated Convertible Debentures.

(j) Defendant MESHULAM RIKLIS ("Riklis"), since 1955, has been and is now, by virtue of his ownership of over 500,000 shares of common stock of Rapid, and his position

as a director, President and Chairman of the Board of Directors of Rapid, and his position as Chairman of the Board and Chief Executive Officer of Glen Alden, the person who, with the consent and participation of the other directors of Rapid, Glen Alden and Schenley, controls and dominates the affairs and business of the corporate defendants, their directors and officers.

(k) Defendants, P. J. CLIFFORD, W. P. JOHNSON, S. KITTAY, M. L. MENDELL, L. C. LANE, C. H. PERKINS, were and are directors of defendant Glen Alden.

(l) Defendant BERNHARDT DENMARK ("Denmark") since February 26, 1970 has been a director of Schenley; is a director of Glen Alden and is Glen Alden's Executive Vice President, having held such offices since 1968.

5. This Count is brought by plaintiffs Cole, Zisook, Harold Stiller and Mildred Stiller against defendants Schenley Glen Alden, Rapid, Becker, Goldberg, Johnston, Chernow, Heinze, Feldman, Hopkins, Smith, Greenfield, Riklis and Denmark.

6. Defendant Schenley, at all times relevant herein, has been engaged in the business of producing and distributing distilled liquors and wines. At May 10, 1971 Schenley had outstanding 7,979,747 shares of common stock (Schenley Common) and 2,520,005 shares of $1.40 Cumulative Convertible Preferred Stock (Schenley Preferred), which were originally issued on or about December 15, 1969. Each share of Schenley Preferred is redeemable at $24 per share and is convertible into 9/10 of a share of Schenley Common, at the option of the holder, at any time through the third day prior to the date fixed for redemption. Schenley also has outstanding, as of December 31, 1970, 197,594 shares of Cumulative Preference Stock, redeemable at $10 per share, at any time, with an annual dividend rate of $.50, which is not convertible into Schenley Common.

7. On March 20, 1968 Glen Alden purchased 1,417,689 shares of Schenley Common from Lewis S. Rosenstiel, then Chairman of the Board of Directors of Schenley, and six other sellers, at an aggregate purchase price of $75,610,080, which amounted to approximately $53.33 per share. On April 26, 1968 Glen Alden purchased an additional 110,000 shares of Schenley common stock on the New York Stock Exchange at an aggregate purchase price of $5,851,208, which averaged $53.20 per share. In August 1968 Glen Alden, pursuant to

a tender offer, acquired an addition 5,359,400 shares of Schenley common stock through an exchange of cash and debt securities of Glen Alden.

8. Since on or about December 31, 1968, Glen Alden has been and is now the beneficial owner of 6,887,089 shares of Schenley common stock constituting approximately 86% of the outstanding Schenley common and 84% of the voting power of the outstanding capital stock of Schenley. Glen Alden owns no Schenley Preferred.

9. From as early as on or about January 1, 1969 to date, Glen Alden, by virtue of its stock ownership, has controlled and dominated the affairs of Schenley and the decisions of the officers and directors of Schenley and have nominated and elected its officers and directors. Rapid, through its stock ownership of Glen Alden, has dominated and controlled the business and affairs of both Glen Alden and Schenley. Glen Alden and Rapid, as the controlling stockholders of Schenley, and the other named defendants, acting in concert with Glen Alden and Rapid, have been and are now under a fiduciary obligation to deal fairly with those persons, other than defendants, who are the holders of Schenley Preferred and Schenley Common ("Minority Stockholders of Schenley").

10. On or about February 24, 1971, defendants Glen Alden and Schenley announced the terms of a proposed merger of those companies upon terms substantially similar to those described in paragraph 11 below.

11. The named individual defendants, acting together, on or about May 21, 1971, caused Schenley to enter into a Plan of Reorganization and an Agreement of Merger, under which Schenley was to be merged with Glen Alden Subsidiary, Inc., a wholly-owned subsidiary of Glen Alden. Thereafter, as the surviving corporation, Schenley was to become the wholly-owned subsidiary of Glen Alden, by Glen Alden purchasing each of the outstanding shares of Schenley Common for $5 per share and $30 principal amount of a 7-1/2% Glen Alden Sinking Fund Subordinated Debentures due 1985 ("7-1/2% Debentures) and each of the outstanding shares of Schenley Preferred for $4.50 in cash and $27 principal amount of 7-1/2% Glen Alden Debentures. The consummation of the merger required the approval of a majority of the combined outstanding voting power of Schenley with each share of Schenley Common entitled to one vote and each share of Schenley Preferred entitled to 1/10 of a vote.

12. The defendants, other than Schenley, caused defendant Schenley, by use of the mails and the means and instrumentalities of interstate commerce, to distribute a Proxy Statement, dated May 21, 1971 ("Proxy Statement"). Proxies were solicited thereunder on behalf of the management from the holders of Schenley Preferred and Schenley Common to vote, at a June 17, 1971 meeting of stockholders of Schenley, on the adoption of the proposed merger.

13. At said stockholder's meeting, a total of 7,233,866 votes were cast in favor of the merger, including 6,887,069 votes cast by Glen Alden, and 198,150 votes were cast against the merger. The holders of approximately 200,000 shares of Common and 1,000,000 shares of Preferred Schenley stock filed written objections to the merger. The merger was declared by defendants to be effective on June 17, 1971.

14. Upon information and belief, the holders of 910,000 shares of Schenley Preferred and Common shares have demanded appraisal of the value of their shares.

15. As hereinafter set forth in paragraphs 16 through 28, the Proxy Statement contained statements which, at the time and in the light of the circumstances under which the same were made, were false or misleading with respect to a material fact, or which omitted to state a material fact, necessary in order to make the statements made therein not false or misleading. As such, the Proxy Statement violated and continues to violate the provisions of §14(a) of the 1934 Act and Regulation 14A and, more particularly, Regulation 14a-9 thereof, as promulgated by the SEC.

16. In the period from on or about January 1968 to date defendants knew and concealed from the Minority Stockholders of Schenley, and the public, the following material facts, which were not disclosed as required in the Proxy Statement, the Registration Statement and Prospectus of Glen Alden which became effective on or about August 8, 1968, the financial statements and the Forms 8-K and 10-K of Schenley and Glen Alden that were filed with the SEC by them with respect to said period.

(a) At all such times, Schenley's working capital of approximately $324,000,000, _i.e._, its current assets (cash, receivables, inventory of wines and spirits, and marketable securities), less its current liabilities, was at least $200,000,000 more than Schenley required in order

to operate its business.

(b) At all such times it was the intention of defendants to cause Schenley to liquidate and convert into cash at least $200,000,000 of its current assets in the following manner:

(i) The liquidation, through sales in bulk, of at least $120,000,000 of its surplus inventories of spirits and wines. At August 30, 1968, Schenley's entire inventory had a book value of $342,800,000. Such surplus was no longer needed by Schenley, by reason of the discontinuance, or the declining demand for, or unsatisfactory profit margins in, certain brand labels or types of spirits and wines. The annual carrying costs, i.e., insurance, storage, etc., substantial in amount, of such inventories, and the existence of a ready market for the sale in bulk, at prices equal to, or substantially above, their book value, provided the basis for Schenley adopting, in late 1968, the policy of making bulk sales of its surplus inventory.

(ii) By December 31, 1970, through such sales, Schenley had liquidated at least $40,000,000 of its surplus inventory. At all times between January 1, 1971 and the date

hereof, the policy and practices of liquidation of surplus inventories continued in effect.

(iii) The collections, at face value, of accounts receivable, in the amount of at least $20,000,000, which were created, in the first instance, by sales of bottled goods, upon credit terms, to wholesalers and distributors, including those controlled by or obligated to Schenley, in amounts that exceeded the seasonal requirements of the buyers.

(iv) The liquidation of Schenley's marketable securities which, as of August 31, 1968, had a market value of over $35,000,000. The cash proceeds, together with the surplus cash on hand and to be derived, in part, from the planned sale of certain assets connected with Schenley's wine business, would total not less than $60,000,000.

(c) It was practicable, and in the best interests of Schenley and its stockholders, for Schenley to liquidate its excess current assets as stated above, as well as to distribute the proceeds, amounting to at least $20 per share (assuming conversion of the Schenley $1.40 Preferred into Schenley Common), to all stockholders of Schenley for the following reasons:

(i) The foregoing liquidation of assets and the distribution by Schenley of at least $200,000,000 or more in cash would have no adverse effect on the future earning power, or going concern value, of the remaining assets of Schenley because the assets to be liquidated and distributed were not needed to finance the continued operations of Schenley.

(ii) The restrictions, under the anti-trust laws, then applicable to the acquisition by Schenley of additional liquor businesses prevented Schenley from investing the whole or any part of said $200,000,000 in such businesses.

(iii) It would have been impractical for the management of Schenley, having no significant previous business experience in other industries, to invest the whole or any part of said $200,000,000 in a non-liquor industry.

(d) But for the alleged merger between Schenley and Glen Alden the $20 per share of Schenley Common to be realized from the liquidation of Schenley's excess current assets, and the $9.30 per share of Schenley Common to be realized from the net proceeds of the sale on May 10, 1971 of its entire interest in The Buckingham Corporation ("Buckingham"), to Northwest

Industries, Inc. for $120,000,000 described in the next following paragraph, would have been available for distribution, from time to time, to all stockholders of Schenley in partial liquidation of its excess working capital, without adversely affecting the current or future earnings of Schenley.

17. Based on actual results of operations in 1970, Schenley's annual earnings would amount to approximately $22,500,000, or $2.18 per share, excluding the earnings of Buckingham and assuming the proceeds of the May 10, 1971 Buckingham sale were applied to the reduction of Schenley's long term indebtedness. Said earnings are hereinafter referred to as "Pro Forma Earnings" and were set forth in the Proxy Statement.

18. With respect to the Pro Forma Earnings, defendants knew before May 21, 1971 and failed to disclose in the Proxy Statement, as required, that:

(a) The distribution of approximately $200,000,000 of Schenley's excess working capital to its stockholders would have little or no adverse effect upon those earnings.

(b) The minimum fair value of the Schenley common shares was equivalent to thirteen times those earnings, or $28.34 per share.

(c) The fair value of the Schenley Common and Preferred shares at the time of the merger was equivalent to at least 16 times the Pro Forma Earnings, a more appropriate multiple of earnings in view of the fact that the earnings of Schenley in 1971 and thereafter would increase substantially because of:

(i) the overhead expense reduction program that had been put into effect in 1968 by the new management of Schenley;

(ii) the future benefits to be realized from the non-recurring transitional costs incurred in 1968 and 1969 in accomplishing marketing, production and other organizational changes;

(iii) the continuation of the policy, commenced in 1968 by Schenley, of selecting an increasingly larger portion (as compared to the years preceding 1968) of its more costly surplus inventory of domestic and Canadian whiskies 6 years or older in age, and a correspondingly smaller portion of less costly younger whiskies, for current sales of bulk and bottled spirits. Such policy had the effect of increasing the cost of goods sold and thereby decreasing the amount of profit and its percentage ratio to sales in the years 1968 to date. As those inventories of more costly older whiskies were being depleted and a greater portion of lower cost younger whiskies were utilized in their place for current sales of bulk and bottled whiskey, profits would increase in amount and in percentage ratio to sales.

(iv) the increase in cash flow resulting from the continuation of the policy commenced in 1968 of reducing current domestic and Canadian production of new spirits;

(v) the past and current industry-wide trend of yearly increases in the consumption of whiskey from which Schenley would benefit; and

(vi) the stocks of most of the other comparable

liquor companies were selling in the marketplace at the time of the merger at a multiple of 15 or more times current earnings.

19. Upon information and belief, the Proxy Statement failed to disclose, as required, that prior to May, 1971, defendants, including Riklis, Glen Alden and Rapid, had negotiated and received offers to buy the goodwill related to certain brand labels of Schenley at prices ranging from fourteen to twenty times net earnings, after taxes, plus the Schenley book value of inventory, plant and equipment, at the time of sale. Sales at such prices would have produced values for those assets which were substantially higher than their then book value as reflected in the financial statements of Schenley that were included in the Proxy Statement.

20. During the period prior to and between July 1969 to February 24, 1971, the defendants also depressed the market prices of Schenley shares by concealing from the Schenley shareholders, as well as the investing public, the additional fact that the fair value of Schenley's investment in The Buckingham Corporation was at least $75,000,000 more than their Schenley book value of $32,970,000, which reflected their original cost in 1964 when Schenley purchased 3,054,450 shares of Buckingham common stock at $10.50 per share.

21. The Proxy Statement gave the unavoidable and singular impression that in the opinion of Schenley and Glen Alden the fair value of the Schenley shares for the purpose of merger was equivalent to their highest market price in the period between July of 1969 and February 24, 1971 when the merger was announced. Such market price approximated

$29 for the Schenley Common and $26 for the Schenley Preferred shares. However, those market prices had been artificially depressed during that entire period as well as prior thereto by the concealment of the facts alleged in paragraphs 16 through 20 above and in paragraph 22 below. Disclosure of such facts would have revealed that the fair value of those shares during that period was not less than $48.34 per share for Schenley Common and $43.50 per share for Schenley Preferred and as much as $64 and $57, respectively.

22. (a) By a Proxy Statement dated November 17, 1969, Schenley had proposed to acquire the 2,742,450 shares of common stock of Buckingham held by persons other than Schenley through a merger of Buckingham with Schenley under which Schenley was to exchange one share of the newly authorized Schenley Preferred in exchange for each share of Buckingham common. That merger was consummated.

(b) Upon information and belief, prior to November 17, 1969, defendants Riklis, Glen Alden and Rapid had negotiated and had received good faith offers from third persons to purchase the 3,054,450 shares of Buckingham common that were then owned by Schenley at a price of $36 per share or more. The November 17, 1969 Proxy Statement failed to disclose, as required, that a ready market existed for the sale of the shares at a price substantially higher than their book value as reflected on the books of Schenley and Buckingham. Such failure to disclose also rendered untrue and misleading those portions of the 1969 Proxy Statement that stated

(i) the Buckingham shares per the latter's books had a book value of $7.31 per share (page 11); (ii) the market price of BHM common stock to be in the range of $19 to $23.75 per share in the four and one-half months that preceded the November 17, 1969 Proxy Statement (page 16), and (iii) that no firm offers for the Buckingham common were received and no negotiations were commenced in the year prior to November 17, 1969 (page 16).

20. The market prices of Schenley's shares in 1970 and 1971 did not reflect the substantial increase in their intrinsic value attributable to the then value of its investment in Buckingham or to the consummation on May 10, 1971 of the sale by Schenley, of its interest in Buckingham to Northwest Industries Inc. ("Northwest").

(a) On November 2, 1970, it was publicly announced that Schenley and Northwest had reached an agreement for the sale of Buckingham for $120,000,000 with the closing to take place as soon as possible, but no later than December 31, 1970. A series of later announcements reported the postponement of the closing to February 28, 1971, March 30, 1971, April 3, 1971, April 30, 1971 and May 10, 1971. Those later announcements gave the impression that the consummation of the sale had been made uncertain by:

(i) The difficulties of Northwest in obtaining the financing necessary to close the proposed purchase; and

(ii) The delays being encountered in obtaining

the necessary approval of the proposed sale from the United States Government, who, in April 1966, had commenced an antitrust action to divest Schenley of its controlling interest in Buckingham.

(b) On March 29, 1971, a consent decree was entered that permitted the consummation of the sale to Northwest. In fact, it was not until sometime in April or early in May 1971 that the definitive agreement was reached for the sale of Buckingham to Northwest.

24. The 1971 Proxy Statement failed to disclose in the required form and manner the following material facts:

(a) The 6,887,089 Schenley common shares acquired by Glen Alden in 1968 were reflected in Glen Alden's financial statements at an average value per share of about $57, representing their cost to Glen Alden, exclusive of the discount of $91,000,000 from the face amount attributable to the Glen Alden 6% Debentures, which were given in payment for those shares.

(b) As of May 21, 1971, Glen Alden and its management were of the opinion that the $57 per share value of the Schenley Common, when acquired by Glen Alden in 1968, had not declined in value since the 1968 acquisition. The opinion, to such specific effect, is expressed in small

print and obscure language which is buried, some 75 pages after page 4 of the Proxy Statement, in a footnote "D" to the financial statements of Glen Alden for the years ended December 31, 1969 and 1970, at page F-13, as follows:

> "D. Intangibles and Franchises
>
> Intangibles represent the excess of unallocated cost of investments over equity in net assets of Schenley ($85,583,212) and other subsidiaries (1969-$34,198,673; 1970-$43,044,733). These net excess acquisition costs have been recognized by the management of Glen Alden as being similar in nature to intangibles which have not declined in value since acquisition. Accordingly, at the respective dates of acquisition, the management of Glen Alden adopted the policy of not amortizing these excess purchase costs so long as there is no diminution in value of the related investments." (emphasis supplied)

25. While the 1971 Proxy Statement, at page 5 stated,

> "It is expected that the fair market value of the Debentures [the 7-1/2% Glen Alden Debentures into which the shares of Schenley preferred and common are to be converted under the merger] on the effective date of the proposed reorganization [the merger] will be less than their face amount",

the Proxy Statement failed to disclose, as required, the following material facts, which would permit the reader of the Proxy Statement to appraise the value of the proposed 7-1/2% Debentures based on the value of the 6% Debentures of Glen Alden that are traded on the New York Stock Exchange and, except for minor differences in sinking fund interest

rate and maturity date, the two issues are the same:

(a) The 6% Glen Alden Debentures which were given in 1968 in exchange, by Glen Alden, for the Schenley common, between January 1, 1971 and May 21, 1971, had a market value which ranged from 62-1/4 to 53-1/4 per $100 in face amount, as shown by the quoted prices of the 6% Debentures on the New York Stock Exchange. On May 20, 1971, the closing price was 57-1/2.

(b) The 6% Debentures were rated "B" in investment quality by Moody's Financial Service and in Moody's Industrial Manual. The purpose of such rating is to provide the American investor with a simple system of gradation by which the relative investment qualities of funds may be noted. Bonds graded "B" are those

> "Bonds which . . . . lack characteristics of the desirable investment. Assurance of interest and principal payments or of maintenance of other terms of the contract over any long period of time may be small." (Moody's Industrial Manual, 1970, pp. v, vi)

26. The Proxy Statement is both false and deceptively misleading in stating the authority for and the validity of the merger as being predicated on the merger laws of the State of Delaware; whereas, in fact and in law, the terms,

purposes and effects of the 1971 merger took that merger outside the scope, pur se and application of those laws, as set forth in Count II hereof, all the allegations of which are herein incorporated by reference. Consequently, the merger is invalid and is of no force and effect under the laws and precedents of the State of Delaware.

27. In legal effect, the alleged merger was nothing more than a tender offer which would be binding upon only those holders of Schenley shares who, without knowledge of the matters herein complained of, voluntarily accepted the same. Such being the case, the Proxy Statement erroneously describes the nature and binding effect of the purported merger and the choices available to the holders of Schenley shares, including those desiring to exercise their right of appraisal under Section 262 of the Delaware Law, as described at pages 6 and 7 of the Proxy Statement. With respect to said right of appraisal, the Proxy Statement failed to disclose, as required, that a stockholder who demanded appraisal would be treated by Schenley and Glen Alden as having made an election of remedy that precluded such stockholder from becoming a member of the class on whose behalf the within actions, as described at pages 8 through 11 of the Proxy Statement, were brought.

28. The terms of the 1971 merger were grossly unfair to the Minority Stockholders of Schenley. In June and July 1971, the 7-1/2% Glen Alden debentures were quoted on the New York Stock Exchange on a "when issued" basis at a 32%

discount from face amount. Based on such discount, the holders of Schenley Preferred and Common will receive cash and debentures, having a fair value of $22.86 and $25.40 per share, respectively, whereas the fair value of those shares was a minimum of $43.50 and $48.34 per share, respectively. Thus, that merger has deprived the holders of 2,520,005 shares of Schenley Preferred and 1,092,658 shares of Schenley Common of at least $20.64 and $22.94, respectively, per share, with a resulting undeserved profit and gain to Glen Alden of not less than $77,000,000.

29. In addition, those persons similarly situated, who were stockholders of Schenley on February 24, 1971 and who, without knowledge of the true facts and who believed the proposed merger to be unfair, inadequate or otherwise unacceptable, and thereby were forced to sell and sold their shares in the market after the public announcement of the merger on February 25, 1971 and on or before June 17, 1971, when the Schenley Common and Preferred shares were delisted from trading on the New York Stock Exchange, were similarly damaged by an amount equal to the difference between the fair value of their shares on the day of sale and the proceeds derived from selling their shares at market prices that were artificially depressed by defendants in the respects herein set forth.

30. The unfairness of the merger is compounded, from the standpoint of the Minority Stockholders of Schenley, by comparing the investment value of their shares with that of the 7-1/2% Debentures. Thus:

(a) The $1.40 annual dividend on the Preferred is covered eight times by the current earnings, after taxes, of Schenley; whereas Glen Alden's fixed charges of interest and debt expense, including interest on the 7-1/2% Debentures, according to the Proxy Statement, willbe covered 1.46 times by earnings before income taxes after the merger.

(b) The preference on liquidation of the Preferred is $61,000,000 and the net assets of Schenley available to pay such preference are $417,000,000; whereas the tangible assets of Glen Alden are valued at $1,032,000,000 and its total liabilities at $1,036,000,000 after the merger.

(c) The Schenley Preferred is presently convertible into 9/10 of a share of Common, thus giving the holder the valuable option to share in the increasing prosperity of Schenley; whereas the 7-1/2% Debentures are not convertible into an equity security of Glen Alden.

31. The terms of the merger were inadequate and unfair to the Minority Stockholders for the reasons stated above in paragraphs 16 through 30, and for the further reason that the terms of the merger were based on the market prices of the Schenley shares on the New York Stock Exchange between July 1969 through February 24, 1971. These market prices did not

reflect the higher fair value of those shares for purposes of the merger in at least three respects, as follows:

(a) Those market prices were artificially depressed by defendants, as stated in paragraphs 20 through 23.

(b) Between 1969 and 1971 the market for Schenley common shares was a limited one in which there was no active trading. While there was more active trading in Schenley Preferred, those shares, because of their convertibility into 9/10ths of a share of Common, were traded at prices equal to 9/10th of the price of the Common. After September 1968 Glen Alden was the owner of 6,887,089 shares of Schenley Common and only 1,092,658 common shares were left outstanding in the hands of about 7,000 persons which were available for trading in the market. From September 1968 through February 1971 the total volume of trading in Schenley Common amounted to 1,007,800 shares or an average of about 1,600 shares per day, whereas the total volume of trading in 1967 was 11,793,150 shares or a daily average of 46,400; and in the first 8 months of 1968 the total volume was 8,110,800, with a daily average of 47,700 shares.

(c) Where, like here, only a small fraction of the outstanding shares are available for trading in the market, current fair value usually exceeded by a substantial amount the current market prices of shares.

32. The conduct complained of herein constituted an integral part of a three step plan, conceived in early 1968, which had, as its main objective, the appropriation by Glen Alden of all of the shares, assets, goodwill and business of Schenley and its subsidiary Buckingham, at prices substantially below their fair value at the expense of the minority stockholders of Schenley and of Buckingham and in violation of their rights and privileges as such stockholders. As below set forth, those steps and their objective could not have been accomplished without the use of deception and concealment by defendants.

(a) The first step of the plan was to have Glen Alden acquire all or substantially all of the Schenley Common. In August, 1968, Glen Alden acquired, through purchase, 5,059,400 shares of Schenley Common pursuant to the tender offer set forth in the Glen Alden Prospectus dated August 8, 1968, without disclosing therein, as required, the facts alleged in paragraphs 16 through 20 hereof. Thereafter, Glen Alden owned 6,887,089 shares, or 86%, of the outstanding Schenley Common.

(b) The second step was to have Schenley as the holder of 52.7% of the outstanding common stock of Buckingham, acquire the remaining shares held by the public at prices substantially less

than their fair value. That step was accomplished in December 1969 by the concealment of material facts which depressed the market prices of Buckingham shares in 1969 as set forth in paragraphs 20 and 22 above and, as alleged in paragraph 33, below, by the use of an untrue and deceptively misleading Proxy Statement of Schenley dated November 17, 1969 ("1969 Proxy Statement"), under which Schenley acquired all of the remaining shares of Buckingham at about 60% of their fair value by the issuance of the newly authorized Schenley Preferred stock.

(c) The third and final step was accomplished when the merger with Glen Alden was consummated on June 17, 1971. As a result, the Minority Stockholders of Schenley, owning 1,092,658 shares of Schenley Common and 2,502,005 shares of Schenley Preferred, were forced by the merger either to sell their shares to Glen Alden for the grossly inadequate consideration specified by the terms of the merger, or to sell their shares in the open market between February 25, 1971 and June 17, 1971 at artificially depressed market prices. Such result could not have been accomplished without the use of concealment, deception and the artificial depression of the market prices of Schenley shares, as set forth in paragraphs 16 through 31 and 33 hereof.

33. Upon information and belief, the 1969 Proxy Statement, which is incorporated herein by reference, contained, among others, the following material misstatements and failures in disclosure:

(a) That "... the management of Glen Alden has under consideration the possible future merger or consolidation of Schenley and Glen Alden. No decision as yet has been made as to whether or when any such merger...might be proposed or as to the forms or terms of such transaction." (p. 25)

The above statement was untrue and deceptively misleading in that, prior to, on, and after November 17, 1969, defendants knew of the nature and effect of recent amendments to the Delaware Corporation Law, hereinafter described, which would permit a merger of Schenley with a subsidiary of Glen Alden, with Schenley remaining as the surviving corporation and with Glen Alden acquiring all outstanding shares of Schenley, including the $1.40 Preferred, in exchange for cash and a debt security of Glen Alden. By November 17, 1969, it had already been decided that after the issuance of the $1.40 Preferred a merger, incorporating the

foregoing terms, would be proposed and consummated. However, defendants failed to disclose that material fact in their Proxy Statement, as required.

(b) Upon information and belief, prior to November 1969, defendants, including Riklis, Glen Alden and Rapid, had negotiations and had received good faith offers from third persons to purchase Schenley's interest in Buckingham, consisting of 3,054,450 shares, for $36 per share or more, based on the then current financial condition of Buckingham. The book value of those Schenley shares was reflected in the published financial statements of Schenley at historical cost of about $10 per share, or $32,970,000. The 1969 Proxy Statement failed to disclose, as required, that a ready market existed for the sale of those shares at a price of $36 or more per share. The failure to make such disclosure rendered untrue and misleading those portions of the Proxy Statement that stated the book value of those shares to be $7.31 per share (p. 11) as well as those portions that stated the market prices of those shares to be in the range of 21-3/8 to 23-3/4 (p. 12). The concealment of the offers to purchase at $36 per share, or

more, also depressed the prevailing market prices of the Schenley and Buckingham shares, as defendants knew.

(c) Defendants knew and failed to disclose in the 1969 Proxy Statement, as required, that recent amendments to §251 of the Delaware Corporation Law, effective July 15, 1969, had lowered the fraction of the stockholder vote required for approval of a merger from 2/3 to a majority of the outstanding shares of Schenley voting together as one class. Those amendments also permitted, for the first time, the issuance of cash and other property in exchange for shares of a party to such a merger. The failure to disclose the nature and effect of those recent amendments rendered untrue and deceptively misleading the following statement

> "Schenley may not, without the consent of the holders of two-thirds of the outstanding shares of Schenley $1.40 Preferred Stock, amend its Certificate of Incorporation to authorize any additional shares of Schenley $1.40 Preferred Stock or of any other class of stock ranking on a parity with or prior to the Schenley $1.40 Preferred Stock as to dividends or rights upon liquidation or to alter or change the powers, preferences, or special rights of the Schenley $1.40 Preferred Stock so as to affect adversely the Schenley $1.40 Preferred Stock." (p. 38)

which was made in the 1969 Proxy Statement.

(d) The above statement was designed to give the prospective holders of the Schenley $1.40 Preferred the false impression that the valuable and attractive right of the holders to convert their shares into 9/10 of a share of Schenley common (at any time prior to the third day fixed for redemption) could not be altered or eliminated without the affirmative vote of 2/3 of the holders of such shares voting as a class. Other statements, made at page 39 of the Proxy Statement, furthered the false impression that any future merger or consolidation of Schenley would not adversely affect those rights of the preferred stock. However, as the defendants knew and failed to disclose, those rights could be adversely affected by resort to the recent amendments to the Delaware Corporation Law. It was these amendments which enabled Glen Alden to deprive the holders of the preferred stock of their attractive and valuable conversion rights and forced those holders to take a debt security of Glen Alden, in exchange for their shares, without the consent of 2/3 of the $1.40 Preferred shares, voting as a separate class. The failure to disclose the nature and effect of those amendments made the above statements, as set forth in the Proxy Statement, false and deceptively misleading.

34. The acts described in paragraphs 33 and 34 hereof were accomplished through the use of the mails and the means of instrumentalities of interstate commerce and constituted a violation of §10(b) of the 1934 Act (15 U.S.C. §78j) and Rule 10b-5 of the Rules and Regulations of the SEC promulgated thereunder (17 CFR §240.10b-5).

35. Unless defendants Glen Alden and Schenley are immediately restrained and enjoined from effectuating the merger, pending the determination of this action, plaintiff and members of the class will suffer irreparable injury.

36. Plaintiff has no adequate remedy at law.

COUNT II

37. The parties in Count II are the plaintiffs Cole and Zisook and the defendants named in Count I, paragraph 5.

38. Jurisdiction of this Count II is founded on diversity of citizenship and amount. The amount in controversy exceeds, exclusive of interest and costs, the sum of TEN THOUSAND ($10,000) DOLLARS.

39. Paragraph 1(c) and all of Count I are made a part hereof by reference.

40. Under Section 251 of the General Corporation Law of the State of Delaware, appended as Exhibit "A: hereto, the merger is invalid and is of no force and effect under the laws and precedents of the State of Delaware for the reasons hereinafter set forth.

41. There is no plausible purpose of the merger which, in any respect, is advantageous to or will promote the interests of Schenley or its stockholders, except Glen Alden, the controlling stockholder. Schenley, as the surviving corporation of the merger, will have the same capitalization and business as it had before the merger was consummated. Schenley will not acquire, by reason of the merger, any additional assets or any new business of any kind. The party to the merger, Glen Alden Subsidiary Inc., has no assets and is not engaged in any business of any kind. The subsidiary is simply a shell which "has

not engaged in any business activities or entered into any transactions whatsoever except the Merger Agreement...nor will it engage in any business activities or transactions prior to the effective date of the Merger" (Plan and Agreement of Reorganization, ¶¶2.3(c), 3.3(a)). After the effective date of the merger, the subsidiary will be dissolved. Glen Alden will then become the owner of all the Schenley Preferred and Common shares previously held by its minority shareholders, none of which will be retired, nor will their rights and preferences be changed. The Schenley Cumulative Preference Stock, unchanged, will remain outstanding in the hands of the public.

42. The sole purpose and effect of the proposed merger was to force the transfer to Glen Alden of the minority's ownership of Schenley Preferred and Common without their consent, at a price which was at least 50% less than fair value, to the undeserved gain of more than $77,000,000 to Glen Alden.

43. The terms of the merger:

(a) were so grossly unfair to the minority stockholders of Schenley to the undeserved gain of Glen Alden, the controlling stockholder; and

(b) reflect such a clear abuse of trust, informed business judgment, discretion and fiduciary obligation by Glen Alden and the directors of Schenley, in entering into the Merger Agreement; and the merger

(c) was accomplished by a false and deceptively incomplete and misleading proxy statement and concealments of material facts relating to the value and market prices of the Schenley Common and Preferred shares

as to render the merger a fraud upon all stockholders of Schenley, other than Glen Alden.

COUNT III

44. Count III is alleged by plaintiffs Harry Walter Voege and Anna May Tunmore, as Trustees under the Last Will and Testament of Harry W. Voege against defendants Smith, Hopkins, Goldberg, Greenfield, Becker, Denmark, Heinze, Johnston, Chernow, Feldman, Clifford, W.P. Johnson, S. Kittay, M.L. Mendell, L.C. Lane, C.H. Perkins, Riklis, Schenley and Glen Alden.

Jurisdiction

45. This count is brought on behalf of all shareholders of Schenley including common shareholders and holders of Schenley $1.40 Convertible Preferred B, convertible into Schenley Common (other than defendant Glen Alden, its officers, directors and parents) who held such stock on February 23, 1971 and who sold such stock after February 23, 1971 at less than a price equivalent to $54 per Schenley common share or who are compelled by virtue of the merger of Schenley and a new subsidiary of Glen Alden to exchange, convert or surrender their Schenley securities for cash or cash and debentures of Glen Alden having a value in the aggregate which is equivalent to less than $54 per Schenley common share.

46. Jurisdiction of this Court is based upon Section 22 of the Securities Act of 1933, as amended to date (15 U.S.C. §77v) and upon Section 27 of the Securities Exchange Act of 1934, as amended to date (15 U.S.C. §78aa). This action is brought to enforce liabilities created by the

Securities Exchange Act of 1934, as amended to date, particularly §10(b) thereof, and the rules and regulations of the Securities and Exchange Commission promulgated thereunder, particularly Rule 10b-5 (17 CFR §240.10b-5) as well as under the common law.

THE TRANSACTION COMPLAINED OF

47. At the times herein set forth, Schenley was and is engaged in the production and distribution of liquors. It had 7,991,777 outstanding common shares of which 6,887,089 shares are held by Glen Alden since 1968. The book value or equity of said common shares is presently $35.50 per share, including therein Schenley's 100% interest in The Buckingham Corporation, at Schenley's cost of $98,738,800. In the year ended December 31, 1970, Schenley earned approximately $3.01 per share. In November, 1970 Schenley agreed to sell its shares in The Buckingham Corporation to Northwest Industries, Inc. for $120,000,000 in cash and notes. Giving effect to such transaction, at its consummation which is scheduled for the end of March, 1971, and deducting applicable capital gains taxes, the book value of a share of Schenley Common would be $37.36. Valuing Schenley Common at 18 times Schenley's 1970 earnings of $3.01 per share, the valuation would be $54.18 per share. Valuing Schenley's common stock at 147% of book value ($37.36 per share), the valuation would be $54.92 per share. At the present time, the fair and reasonable valuation of

Schenley Common is not less than $54 per share. Giving effect to the consummation of The Buckingham sale, the cash position of Schenley would increase (after reserve for capital gains tax) by $113,621,640, and the portion allocable to Schenley's common shareholders is equivalent to $12 per share of Schenley Common.

48. In furtherance of a plan for Glen Alden to acquire the net assets of Schenley, Glen Alden expended in March, 1968, the sum of $75,610,080 in cash to acquire, in an arms-length transaction, from Lewis Rosensteil, Chairman of the Board of Schenley and his associates, at a price of $80 per share, an aggregate of 945,126 shares of the $1.40 par value Schenley Common (18.3%) equivalent after a 3 for 2 split, to 1,417,689 shares of Schenley 93-1/3¢ par value common stock at $53.33-1/3 per share.

49. The Stock Purchase Agreement between Glen Alden and Mr. Rosensteil provided that it was the intention of the parties that all of the holders of Schenley common stock be afforded an opportunity to sell their shares of Schenley common stock for a total consideration comparable to, or more favorable than the purchase price paid to Mr. Rosensteil and his associates. To carry out this intention, Glen Alden, in saidStock Purchase Agreement, agreed with the sellers therein named to make or cause to be made, an offer to purchase all other outstanding shares of Schenley common stock from the holders thereof on terms

not less favorable than the terms of a proposed offer set forth in the Stock Purchase Agreement.

50. By virtue of said Stock Purchase Agreement, plaintiffs and the other members of the class became third party beneficiaries of Glen Alden's contractual obligation to make an offer to purchase their shares of Schenley common on terms not less favorable than the terms of the proposed offer set forth in the Stock Purchase Agreement.

51. In furtherance of the aforesaid plan for Glen Alden to acquire the net assets of Schenley and to carry out its obligations under and its intentions expressed in the said Stock Purchase Agreement with Mr. Rosenstiel and his associates, Glen Alden announced in August, 1968 a tender offer to acquire all of the remaining outstanding shares of Schenley Common held by the public, including the plaintiffs, whereby Glen Alden offered to exchange $100 aggregate principal amount of its 6% Sinking Fund Subordinated Debentures due August 15, 1988, plus the sum of $13 in cash for each one and one-half shares of Schenley 93-1/3¢ par value common stock tendered pursuant to the offer. Said tender offer was represented by Glen Alden to be not less favorable than the proposed offer set forth in the Stock Purchase Agreement.

52. Said tender offer provided for an arms-length transaction between Glen Alden and the public common stockholders of Schenley. The prospectus pursuant to which said offer was made stated (at page 2 thereof):

"The choices available to the holders of Schenley common stock include, but are not necessarily limited to, the following: (a) to accept the Glen Alden Exchange Offer and either hold or sell the Debentures received as a result thereof; (b) to continue to hold their Schenley common stock; or (c) to sell their Schenley Common Stock."

53. (a) Said prospectus further states (at page 7):

"After completion of the Exchange Offer, Glen Alden may (subject to future conditions) make a further tender offer to the remaining holders of Schenley common stock or propose to combine Glen Alden and Schenley. In connection with any such further tender offer or combination, the consideration to be received by the holders of Schenley common stock who have not accepted the Exchange Offer may be more than, less than, or the same as that provided in the Exchange Offer."

(b) The prospectus failed to disclose what future conditions would prompt or justify a lesser consideration than that provided in the said Exchange Offer, in view of Glen Alden's obligations under the Rosenstiel Stock Purchase Agreement, and in view of the vested third party beneficiary interest therein of plaintiffs and the other members of the class.

54. The holders of 67.7% of Schenley Common accepted said tender and received from Glen Alden $46,448,000 in cash plus Glen Alden 6% Sinking Fund Debentures due 1988

in the principal sum of $557,293,000, which Glen Alden admitted and contended was equivalent to a consideration of approximately $53.33-1/3 to $56.66-2/3 per share for the 93-1/3¢ par value Schenley Common.

55. The aforesaid admission and contention was made in 1968 by Glen Alden in successfully opposing an injunction application by a Glen Alden stockholder who contended that the consideration offered under the tender offer was equal to $75 per share for Schenley Common, and that such consideration was excessive and a waste of Glen Alden's assets. Glen Alden offered the opposing affidavit of its Vice-President - Finance and Treasurer, who affirmed and acknowledged under oath:

(i) That the offer provided an "eminently sound basis for the acquisition of the shares of Schenley not now held by Glen Alden";

(ii) That after consummation of the tender offer, assuming 100% acceptance by Schenley holders:

(a) Glen Alden's sales will now increase more than 106% from $485,103,000 to $1,003,099,000;

(b) Glen Alden's gross income will increase more than 96% from $537,791,000 to $1,057,293,000.

(c) Glen Alden's net income (all of which will inure to the benefit of Glen Alden's present stockholders) will increase more than 16% from $17,611,000 to $20,519,000.

(d) All future increases in the net income of Glen Alden attributable to Schenley's business will increase the earnings per share of the Glen Alden stockholders.

(e) By reason of the subordinated feature of the Debentures to be issued, Glen Alden's ability to borrow additional monies, should it require financing in the future, will be greatly enhanced.

(iii) That the proposed debentures clearly have a fair market value of substantially less than their face value, and that the management of Glen Alden estimates the debentures to be worth approximately 75% of their face amount which would place a value on Glen Alden's total offer of $85 per Schenley common share (before the 3 for 2 split) or $56.66 per share for Schenley 93-1/3¢ par value common stock.

(iv) That the book value of Schenley's assets is irrelevant to the reasonableness of the offer, and that an offer of 47% over Schenley's book value of $54.60 per common share (equal to $36.40 per share after the split) is fair and reasonable.

(v) That Schenley's earnings for the 12 months ended February 29, 1968 were $4.12 per share (equal to $2.75 per share after the split) and that a price-earnings ratio for liquor stocks of from 16 to 20 times earnings is fair and reasonable.

(vi) That it is highly likely that Glen Alden will be able to materially reduce its repayment obli-

gations under the Debentures by purchasing Debentures in the market at discount from their face value.

(vii) That the probable value of the Debentures would be about 70% (maximum current value, 75%) of the par value of the Debentures.

56. Upon the aforesaid valuation principles, contended and acknowledged by Glen Alden, the injunction applications were judicially denied, and Glen Alden is now collaterally estopped to contend that it will not receive special benefits from 100% ownership of Schenley or that Schenley common stock is to be valued at less than 147% of book value, and at less than 18 times current earnings.

57. Plaintiffs and other holders of Schenley Common holding in the aggregate approximately 14% of Schenley Common elected to continue to hold their Schenley Common, and did not voluntarily accept approximately $54 per share for their stock in 1968. The class consists of such holders, and their successors in ownership of shares that were since sold by such holders.

58. There are presently outstanding 197,108 Schenley preference shares having a redemption value of $10 per share (total redemption price $1,971,080), 2,743,450 shares of $1.40 Schenley cumulative convertible preferred stock having a redemption value of $24 per share (total redemption price $65,842,800), and convertible at the rate

of 9/10 of a common share for each preferred share into 2,470,955 shares of Schenley common stock, and 7,991,777 shares of Schenley Common of which 6,837,089 shares are owned by Glen Alden (which it purchased in 1968 for an average consideration valued by it at $53-1/3 - 56-2/3 per share) and 1,104,688 shares are owned by plaintiffs and the other public minority common stockholders similarly situated.

59. On or about November 2, 1970, Schenley agreed to sell to Northwest Industries, Inc. for $120,000,000 in cash and notes, its 100% ownership of The Buckingham Corporation. This transaction is scheduled to close at the end of March, 1971. In its proxy statement dated on or about November 17, 1969, the holders of Schenley Common, and the holders of BHM Industries, Inc. Common (which BHM Industries Common, on the merger of Schenley and BHM Industries, Inc. in December, 1969, was converted into the $1.40 cumulative convertible preferred stock of Schenley) were advised that:

> "If after the consummation of the proposed merger, Schenley were to sell the outstanding stock of Buckingham, which it would then own, such sale would be taxable to Schenley at capital gains rates to the extent that the proceeds of sale exceeded Schenley's basis in the stock of Buckingham (which after the proposed merger will be the same as BHM's basis in said stock). Under proposed legislation presently pending in Congress, the maximum tax on long-term capital gains realized

by a corporation would be raised from the present 25% rate (excluding surtax) to a 30% rate. Although it is not possible at the present time to determine the exact amount of BHM's basis in the stock of Buckingham, the management of BHM estimates that its total basis is between approximately $80,000,000 and $90,000,000. This basis consists of approximately $32,970,000 derived from Schenley's former 52.66% stock interest in Buckingham with the balance being derived from the former public stockholders of Buckingham in the May 15, 1969 reorganization."

60. On completion of this transaction (after reserves for capital gains tax) the book value of Schenley common stock (if fully diluted) will be $36 per share, and the cash position of Schenley will be increased by $108,000,000. After giving effect to a contemplated distribution of $4.50 in cash on the 2,743,450 outstanding Schenley preferred shares (aggregating $12,345,525) the remaining cash of $95,655,000 would include $82,438,500 allocable to Glen Alden's 6,887,089 common shares, and $13,216,500 allocable to the 1,104,688 Schenley common shares held by plaintiffs and the other public minority common shareholders, at the rate of approximately $11.97 per share. If said $4.50 cash distribution to the preferred shareholders is enjoined, the net cash proceeds of $108,000,000 would be allocable to the common stock (on a fully diluted basis) at the rate of $10.31 per share, of which $71,005,888 would be allocable to Glen Alden's 6,887,089 common shares, $11,389,333 would be allocable to the 1,104,688 Schenley common shares held by the public minority common stockholders of Schenley, and $25,604,750

would be allocable to the holders of Schenley's 2,743,450 preferred shares (at the rate of $9.28 per preferred share.)

61. On or prior to February 26, 1971 the defendants wrongfully, unlawfully and improperly planned, colluded and conspired together to unjustly enrich Glen Alden at the expense of and to the detriment of Schenley's minority and public stockholders, by using Glen Alden's domination and control of Schenley, in a self-dealing transaction, to effect a merger which would enable Glen Alden to appropriate to itself $99,733,000 of the cash and notes to be received from Northwest Industries, Inc. or $28,727,112 more than the $71,005,888 share thereof allocable to Glen Alden as set forth in paragraph 60 hereof, by distributing to the public preferred stockholders of Schenley the sum of $4.50 per share, or $4.78 per share less than such stockholders' distributive share as set forth in paragraph 60 hereof, and by distributing to the public minority common stockholders of Schenley the sum of $5 a share, or $5.31 per share less than such stockholders' distributable share, as set forth in paragraph 60 hereof. In addition, pursuant to such plan and conspiracy, the class was to receive for their common shares (having a value of not less than $54 per share as alleged in paragraph 47 hereof) $30 per share in 7-1/2% 15 year Glen Alden senior subordinated debentures, having a probable market

value, according to the valuation principles acknowledged and contended for by Glen Alden, as alleged in paragraph 55 hereof, of not more than $21.60 applicable to each common share. Furthermore, pursuant to such plan and conspiracy the public holders of preferred shares (convertible into common) were to receive, in addition, for their preferred shares (having a value on conversion of not less than $48.60 per share) $27 per share in 7-1/2% 15-year Glen Alden senior subordinated debentures, having a probable market value, according to the aforesaid valuation principles, of $19.44 applicable to each preferred share. According to this plan, the consideration to be distributed to Schenley's minority public common stockholders would have a total cash value of $26.60 for each Schenley common share, having a present worth of at least $54 per share, to the damage of the minority common stockholders of at least $26.50 per share, or $30,268,450 in the aggregate, in which amount Glen Alden will benefit and profit and be unjustly enriched, at the expense of this portion of the class. Furthermore, according to this plan, the consideration to be distributed to Schenley's public preferred stockholders would have a total cash value of $23.94 per share (which is less than the $24 per share redemption value of such preferred shares) having a present worth of at least $48.60 per share, on conversion, to the damage of the public preferred shareholders of at least $19.66 per share or $53,977,613. Glen Alden will

benefit and profit and be unjustly enriched in the aforesaid sums, which aggregate $84,246,000, at the expense of the Class.

62. There were no conditions that occurred or exist since 1968 which would prompt or justify a lesser consideration to be offered to the Minority Stockholders of Schenley than that provided in the 1968 exchange offer, in view of Glen Alden's obligations under the 1968 Stock Purchase Agreement with Mr. Rosensteil and his associates, and the vested third party beneficiary interest therein of plaintiffs and the other members of the class, and in view of the further facts that in 1968, when Glen Alden adopted a valuation of 20 times Schenley's earnings for Schenley Common, Schenley's earnings were $2.75 per share, and such earnings are now $3.01 per share, and in 1968, when Glen Alden adopted a valuation of 147% of book value for Schenley Common, Schenley's book value was $36.40 per common share, and such book value, at the time the proposed merger is to be effective, will be $37.36 per share, after the Buckingham sale.

63. By virtue of the foregoing, the aforesaid plan, whereby the plaintiffs and the class are to become involuntary sellers of their Schenley Common having a value of not less than $54 per share, for a consideration valued at $27.50 per share, is unfair to the minority, is designed to injure the minority, and its effect is so grossly unfair to the minority as to be shocking and fraudulent. Said plan is subject to injunction and rescission under the case law of Delaware.

64. Glen Alden, as the Majority Stockholder and controlling and dominating person of Schenley, is in a fiduciary position to Schenley and its minority stockholders and it would be a violation of the fiduciary obligations of such position for Glen Alden to use its majority control and domination powers to effect a merger by means of a self-dealing transaction whereby the Minority Stockholders are to be compelled to become involuntary sellers of their Schenley stock for a grossly and shockingly inadequate consideration, in violation of their vested third party beneficiary rights under the 1968 Stock Purchase Agreement between Glen Alden and Rosenstiel, particularly when Glen Alden is collaterally estopped to value the shares of Schenley common stock held by the minority upon principles which are inconsistent with those adopted by it in prior litigation, as alleged in paragraph 55 hereof.

65. (a) The foregoing plan constitutes, and the use by Glen Alden of its majority stockholdings in Schenley and its control and domination of Schenley's Board of Directors to effectuate the same, would constitute an act, practice, and course of business which operates or would operate as a fraud and deceit upon the minority public common stockholders of Schenley, including the plaintiffs, as a class, in connection with the forced sale of their Schenley shares under the proposed merger, in violation of

the prohibitions of Section 10 of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated by the Securities and Exchange Commission thereunder.

(b) In furtherance of said scheme, on May 21, 1971, a proxy statement was mailed to Schenley's shareholders. The Proxy Statement represented that after the sale of Buckingham, total revenues of Schenley would be reduced by $60,093,000, and operating net income of Schenley would be reduced by $4,640,000. The Proxy Statement omitted to state, among other things, that despite the Buckingham sale, Schenley would share in the upward surge of industry sales of distilled spirits and wine for 1971, which sales exceed sales for 1970 by at least $140,000,000, or at least 4%, and that Schenley's 1971 revenues will exceed the sum represented in the Proxy Statement by at least $24,000,000, with a resultant net income in excess of that represented in the Proxy Statement. By reason thereof, said Proxy Statement was false and misleading, and the approval of the merger will result from fraudulent, misleading and deceitful statements and omissions, in violation of §10 of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated by the Securities and Exchange Commission thereunder.

66. Plaintiffs, in behalf of themselves and in behalf of the class, and the class are entitled to a pre-

liminary and final injunction against the implimentation of the aforesaid plan, and the merger proposed thereby upon the terms set forth above, as well as a judgment declaring said plan to be null and void, cancelled and rescinded.

67. In the event that, prior to the trial of this action and the entry of judgment herein, said plan and merger is consummated upon the terms proposed, as set forth above, or as subsequently modified, without providing for a consideration having a presently realizable value of at least $54 per share to be paid to the public Schenley common shareholders for their shares, plaintiffs and the class are entitled to judgment against the defendants, jointly and severally, for their damages, including the fair value of their Schenley common shares, plus punitive damages, as well as for an accounting from the defendants, jointly and severally, of the profits and benefits resulting to them from the merger.

COUNT IV

68. (a) This count is brought by plaintiff Greenfield, upon information and belief, except as to paragraph 2(d) which is alleged upon knowledge, against defendants Schenley, Glen Alden, Becker, Goldberg, Chernow, Feldman, Denmark, Greenfield, Hopkins, Heinz, Johnston, and Rapid-American.

(b) Plaintiff Greenfield repeats and realleges the allegations in paragraphs "1", "3", "4", "6", "7", "9", "12", "13", "6 - 28", "30", "31", "32", "33" and "34" of this consolidated amended complaint.

69. (a) Jurisdiction of this Court is based upon §27 of the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. §78aa, as amended.

(b) The claims alleged herein arise under the Act and the rules and regulations of the SEC promulgated thereunder and the principles of pendent jurisdiction.

(c) The illegal acts complained of herein occurred in substantial part in the Southern District of New York.

70. This Count is brought on behalf of all shareholders of Schenley Industries, Inc. ("Schenley") including common shareholders, $1.40 convertible preferred B ($1.40 Preferred) shareholders and preferred A shareholders of Schenley.

71. Defendant Glen Alden by virtue of its purchases of Schenley's common stock from Lewis S. Rosenstiel and by virtue of a tender offer it made for Schenley's common stock, both of which purchases were made in 1968, owned over 80% of Schenley's common stock. By virtue of its dominant stock position in Schenley, Glen Alden designated Schenley's directors and dominated and controlled Schenley and its

personnel. Moreover, defendants Becker, Johnston and Denmark, directors of Schenley, were also directors of Glen Alden. Defendants Becker, Johnston, Denmark and Goldberg received substantial remuneration from Glen Alden and were beholden to Glen Alden for their emoluments.

72. On or before February 25, 1971, defendants Rapid and Glen Alden, along with the individual defendants conspired together to eliminate the minority stockholders of Schenley by merging Schenley into a subsidiary of Glen Alden. To achieve this plan, they conspired, jointly and severally, to defraud, deceive and mislead the minority shareholders of Schenley. Their conduct constituted a violation of §10b and Rule 10b-5 of the Act. Defendants' acts in furtherance of the conspiracy were carried out by use of the instrumentalities of interstate commerce and the mails.

73. Defendants' scheme was to merge Schenley into a subsidiary of Glen Alden and pay the minority shareholders of Schenley a grossly inadequate price for their Schenley shares. To further this plan, on or before February 25, 1971, defendants announced that Schenley would be merged into a subsidiary of Glen Alden and that the minority common shareholders of Schenley would receive $5 in cash and $30 in principal amount of new 7-1/2% fifteen year Glen Alden senior subordinated debentures for each Schenley common share. The holders of Schenley's $1.40 Preferred under the plan would receive $4.60 in cash and $27 principal amount

of the aforesaid debentures for each of their shares.

74. The terms of the merger proposal were grossly inadequate to Schenley's minority shareholders. The board of directors of Schenley, which was dominated and controlled by Glen Alden and its parent, Rapid, fraudulently approved said plan. In fact, Schenley's board did not even obtain at the time of their initial approval of said plan any outside independent advice regarding its fairness. Moreover, Schenley's board of directors through the press and other means and instrumentalities of interstate commerce represented to the minority shareholders that the plan was fair and adequate to the minority shareholders.

75. The purpose of this plan, which was not revealed to the minority shareholders, is to force them to sell their Schenley shares to Glen Alden at far below their true value. Their Schenley shares, both Common and Preferred, are worth far in excess of $50 per share. In 1968 when Glen Alden purchased its Schenley shares, it paid in excess of $55 for each Schenley share. In 1968 Schenley was earning approximately $2.24 per common share. In the year ended December 31, 1970 Schenley earned in excess of $3 per common share.

76. Defendants' conduct constitutes a violation of the Act as well as common law principles of trust and fiduciary duty. The proposed purchase of the minority shareholders' interest in Schenley by this forced sale through a merger constitutes a fraud on the minority shareholders.

77. In furtherance of said scheme on May 21, 1971 the Proxy Statement was mailed to Schenley shareholders. The Proxy Statement, among other things, omitted to state that shortly after said merger would be consummated it was Glen Alden's intention for its purposes and for the purposes of its parent, Rapid, and Rapid's principal shareholders, to use Schenley's assets in order to make a tender offer for Glen Alden's common shares. Said tender offer would serve no business purpose for Glen Alden and would further jeopardize its outstanding debt including the new 7-1/2% fifteen year Glen Alden senior subordinated debentures being offered to Schenley's minority shareholders for their Schenley shares.

COUNT V

78. This Count is brought derivatively by plaintiff Zisook on behalf of Schenley.

79. Counts I and II are made a part hereof by reference.

80. Plaintiffs were stockholders of Schenley at the time of the actions complained of and are presently stockholders of Schenley.

81. By reason of the acts hereinabove complained of, defendants have engaged in an unlawful course of conduct which:

(a) violated Sections 14(a) and 10(b) of the 1934 Act and Rules 14a-1-a-9 and 10b-5 of the Rules and Regulations of the SEC promulgated thereunder;

(b) violated the laws and precedents of the State of Delaware;

(c) unlawfully benefited Glen Alden and Rapid-American at the expense and to the damage and detriment of Schenley and its minority stockholders; and

(d) damaged, and will cause further damage to, Schenley.

82. By the foregoing unlawful conduct, defendants have breached their respective fiduciary duties and obligations owing to Schenley and its Minority Stockholders.

33. The unlawful conduct complained of did, does, and will constitute a waste of the corporate assets of Schenley and did, does, and will cause Schenley to incur, among other things, the following substantial, unnecessary and unwarranted additional damages and expenses:

(a) the expense of preparing, issuing and distributing the agreements, the Proxy Statement and the 1969 Proxy Statement and other documents;

(b) the expense of holding stockholders' meetings, at which votes were taken, in such a manner, that violated the laws of the State of Delaware, as well as Section 14(a) of the 1934 Act;

(c) the expense of defending actions which have been and may be instituted by holders of Schenley Preferred and Common, by reason of the transactions described in said Proxy Statements; and

(d) the costs and expenses of attorneys, accountants, financial experts and others, whose services were required in the preparation and consummation of the transactions described in said Proxy Statements.

84. Demand upon the Board of Directors of Schenley to bring this Count is unnecessary and would be futile because the individual defendants, who engaged in the acts and transactions complained of herein, constitute all of the directors of Schenley, who were nominated and elected at the instance of Glen Alden, and the majority, or more, of whom are directors, officers and stockholders of Glen Alden and Rapid.

85. By reason of the unlawful acts of the defendants, alleged in this Count, the attorneys' fees, accountants' fees and other expenses of plaintiff, as fixed and allowed by the Court, should be taxed against, and paid by, the individual defendants, other than Schenley, in the event this action is successfully prosecuted on behalf of Schenley and the class hereinabove described.

WHEREFORE, plaintiffs demand judgment:

(1) Enjoining defendants, temporarily and permanently, from taking any further steps to consummate the alleged merger;

(2) Declaring the alleged merger null and void under the laws of the State of Delaware;

(3) Finding that the said Proxy Statements of Schenley violated Section 14(a) of the 1934 Act and the Rules and Regulationsof the SEC promulgated thereunder;

(4) Finding that defendants have violated Section 10(b) of the 1934 Act and the Rules and Regulationsof the SEC promulgated thereunder;

(5) Awarding compensatory damages in favor of Schenley and members of the class, on whose behalf this action was brought;

(6) Requiring defendants Glen Alden and Rapid to account for the gains and profits that were realized by them at the expense of Schenley and members of the class, on whose behalf this action was brought, and to pay over such gains and profits as the Court may direct;

(7) Requiring defendants to account for all expenses incurred by Schenley, as described in Count V and requiring defendants to reimburse Schenley for the amounts so incurred;

(8) Awarding costs and expenses and reasonable attorneys' and accountants' fees to plaintiffs, in amounts to be fixed by the Court, and to be paid by defendants, other than Schenley, ir such proportions as the Court may order; and

(9) For such other and further relief as

may be just and proper.

Dated: New York, New York
November 12, 1971.

HERMAN ODELL

Herman Odell

Lead counsel for plaintiffs
in the consolidated action.
#1 New York Plaza
New York, New York 10004

AFFIDAVIT

STATE OF ILLINOIS)
COUNTY OF LAKE) SS.

LOIS H. ZISOOK, being duly sworn, deposes and says:

1. She is one of the plaintiffs in the within action.

2. She has read Counts I, II and V of the foregoing Consolidated Amended Complaint and knows the contents thereof; and that the same is true of her own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Lois H. Zisook

Subscribed and Sworn to
before me, a Notary Public,
this 11 day of November, 1971.

Blanche M. Tully

NOTARY PUBLIC

SUBCHAPTER IX. MERGER OR CONSOLIDATION

§251. MERGER OR CONSOLIDATION OF DOMESTIC CORPORATIONS.—(a) Any two or more corporations existing under the laws of this State may merge into a single corporation, which may be any one of the constituent corporations or may consolidate into a new corporation formed by the consolidation, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.

(b) The board of directors of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation. The agreement shall state: (1) the terms and conditions of the merger or consolidation; (2) the mode of carrying the same into effect; (3) such amendments or changes in the certificate of incorporation of the surviving corporation as are desired to be effected by the merger or consolidation, or, if no such amendments or changes are desired, a statement that the certificate of incorporation of one of the constituent corporations shall be the certificate of incorporation of the surviving or resulting corporation; (4) the manner of converting the shares of each of the constituent corporations into shares or other securities of the corporation surviving or resulting from the merger or consolidation, and, if any shares of any of the constituent corporations are not to be converted solely into shares or other securities of the surviving or resulting corporation, the cash, property, rights or securities of any other corporation which the holders of such shares are to receive in exchange for, or upon conversion of such shares and the surrender of the certificates evidencing them, which cash, property, rights or securities of any other corporation may be in addition to or in lieu of shares or other securities of the surviving or resulting corporation; and (5) such other details or provisions as are deemed desirable, including, without limiting the generality of the foregoing, a provision for the payment of cash in lieu of the issuance or recognition of fractional shares, interests or rights, or for any other arrangement with respect thereto, consistent with the provisions of section 155 of this title. The agreement so adopted shall be executed in accordance with section 103 of this title.

(c) The agreement required by subsection (b) shall be submitted to the stockholders of each constituent corporation at an annual or special meeting thereof for the purpose of acting on the agreement. Due notice of the time, place and purpose of the meeting shall be mailed to each holder of stock, whether voting or non-voting, of the corporation at his address as it appears on the records of the corporation, at least 20 days prior to the date of the meeting. At the meeting the agreement shall be considered and a vote taken for its adoption or rejection. If a majority of the outstanding stock of the corporation entitled to vote thereon shall be voted for the adoption of the agreement, that fact shall be certified on the agreement by the secretary or assistant secretary of the corporation under the seal thereof. If the agreement shall be so adopted and certified by each constituent corporation, it shall then, *in addition to the execution required by subsection (b) of this section*, be executed, acknowledged and filed, and shall become effective, in accordance with section 103 of this title. It shall be recorded in the office of the Recorder of the County of this State in which the registered office of each such constituent corporation is located; or if any of the constituent corporations shall have been specially created by a public act of the Legislature, then the agreement shall be recorded in the county where such corporation had its principal place of business in this State.

(d) Any agreement of merger or consolidation may contain a provision that at any time prior to the filing of the agreement with the Secretary of State, the agreement may be terminated by the board of directors of any constituent corporation notwithstanding approval of the agreement by the stockholders of all or any of the constituent corporations.

EXHIBIT "A"

BEST COPY AVAILABLE

(e) In the case of a merger, the certificate of incorporation of the surviving corporation shall automatically be amended to the extent, if any, that changes in the certificate of incorporation are set forth in the agreement of merger.

(f) Notwithstanding the requirements of subsection (c), unless required by its certificate of incorporation, no vote of stockholders of a constituent corporation surviving a merger shall be necessary to authorize a merger if (1) the agreement of merger does not amend in any respect the certificate of incorporation of such *constituent corporation, (2) each share of stock of such constituent corporation outstanding immediately prior to the merger becoming effective shall remain outstanding immediately after the merger as an identical share of the surviving corporation, and (3) either no shares of common stock of the surviving corporation and no shares, securities or obligations convertible into such stock are to be issued or delivered under the plan of merger, or the authorized unissued shares or the treasury shares of common stock of the surviving corporation to be issued or delivered under the plan of merger plus those initially issuable upon conversion of any other shares, securities or obligations to be issued or delivered under such plan do not exceed 20 percent of the shares of common stock of such constituent corporation outstanding immediately prior to the effective date of the merger.* If an agreement of merger is adopted by the constituent corporation surviving the merger, by action of its board of directors and without any vote of its stockholders, pursuant to this subsection, the secretary or assistant secretary of that corporation shall certify on the agreement, under its seal, that the agreement has been adopted pursuant to this subsection and that, as of the date of such certificate, the outstanding shares of the corporation were such as to render this subsection applicable. The agreement so adopted and certified shall then be executed, acknowledged and filed and shall become effective, in accordance with section 103 of this title. Such [illegible] filing shall constitute a representation by the person who executes the agreement that the facts stated in the certificate remain true immediately prior to such filing. (Amended by Ch. 421, L. '70, eff. 7-1-70).

Ch. 421, L. '70, eff. 7-1-70 added matter in italic and deleted at ! "the surviving corporation, and (2) the authorized unissued shares or the treasury shares of any class of stock of the surviving corporation to be issued or delivered under the plan of merger do not exceed 15 per cent of the shares of the surviving corporation of the same class outstanding immediately prior to the effective date of the merger."

EXHIBIT "A"

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a

duly entered in the office of the clerk of the within named court on . 19

Dated,

Yours, etc.,

HERMAN ODELL

Attorney for

Office and Post Office Address

One New York Plaza

Borough of Manhattan New York, N. Y. 10004

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19 .

at M.

Dated,

Yours, etc.,

HERMAN ODELL

Attorney for

Office and Post Office Address

One New York Plaza

Borough of Manhattan New York, N. Y. 10004

To

Attorney(s) for

XXXXXX XXXXX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DOROTHY L. COLE, et al.,

Plaintiffs,

-against-

SCHENLEY INDUSTRIES, INC., et al.,

Defendants.

CONSOLIDATED
AMENDED COMPLAINT

HERMAN ODELL

XXXXXXX Lead Counsel

Office and Post Office Address, Telephone

One New York Plaza

Borough of Manhattan New York, N. Y. 10004

(212) 483-1727

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

....

Attorney(s) for

Merger—Manipulative Device—Class Action—Minority Shareholders—Appraisal Demand.—The court rejected Glen Alden's argument that Schenley shareholders on the effective date of the merger who demanded appraisal of their shares under the Delaware corporation statute must be excluded from this class action. Glen Alden's theory is that where a majority shareholder possesses enough votes to effectuate a merger, the only minority shareholder with a potential federal claim is one who is misled into waiving his appraisal rights. This constitutes an attack on the merits of plaintiffs' claims and, therefore, is not relevant in a class action determination.

See ¶ 60,401, "Related Laws" division, Volume 4.

Class Action—Costs of Notice—Assessment of Merits.—Plaintiffs in a class action must bear the costs of notice to class members, subject to the fixing of costs upon a final disposition of their action. However, they do not have to show they have a substantial possibility of prevailing on the merits upon a motion for class action determination.

See ¶ 60,401, "Related Laws" division, Volume 4.

Herman Odell, New York, New York, Lead Counsel for Plaintiffs.

Fried, Frank, Harris, Shriver & Jacobson, New York, New York for Defendant Glen Alden Corporation.

Simpson, Thacher & Bartlett, New York, New York for Certain Individual Defendants.

Rubin, Wachtel, Baum & Levin, New York, New York for Defendants Rapid-American Corp. and Riklis.

Milton B. Seasonwein, New York, New York for Defendant Schenley Industries, Inc.

Charles Trynin, New York, New York for Harry W. Voege and Anna May Tunmore, as Trustees.

WEINFELD, District Judge: Plaintiffs move for class action determination pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure.

This action is a consolidation of five separate cases attacking the merger of Schenley Industries, Inc. ("Schenley") and Glen Alden Corporation ("Glen Alden"), announced on February 25, 1971 and effectuated on June 17, 1971. In substance, the complaint alleges that the merger terms were unfair to the minority shareholders of Schenley. This claim is based upon allegations that the Schenley proxy statement of May 21, 1971 and defendants' course of conduct between September 1968 and June 1971 involved violations of sections 10(b) and 14(a) of the Securities Exchange Act of 1934.[1] It is alleged that Glen Alden intentionally depressed the market value of Schenley from the time of Glen Alden's purchase of an 86% interest in Schenley in 1968 until the 1971 merger announcement. A reduced conversion rate for the minority shareholders of Schenley is said to have resulted from this alleged conduct by defendants.

Glen Alden's control of Schenley is alleged to have been accomplished in three steps: (1) on March 20, 1968, Glen Alden purchased approximately 1,400,000 shares of Schenley common stock from Lewis S. Rosenstiel, the then Chairman of the Schenley Board, and six other persons; (2) on April 26, 1968, Glen Alden purchased 110,000 shares of Schenley common stock on the market at an average price of $53.20 per share; and (3) in August 1968 Glen Alden acquired over 5,000,000 shares of Schenley common by tender offer for cash and Glen Alden debt securities. These transactions resulted in its acquiring 86% of the outstanding Schenley common, carrying with it control of the conduct and affairs of Schenley.

CLASS ACTION DETERMINATION

The present motion by plaintiffs based upon their consolidated amended complaint proposes that the action be maintained on behalf of four classes, which the complaint defines essentially as follows:

1. Owners (other than defendants) of Schenley shares on June 17, 1971, the effective date of the merger ("Class I");[2]
2. Owners (other than defendants) of Schenley shares as of February 24, 1971 (the day preceding the public announce-

[1] 15 U. S. C. §§ 78j(b) and 78n(a).

[2] This class is denominated "Class I" in the complaint (¶ 1(c)(ii)(aa)).

Merger—Manipulative Device—Class Action—Minority Shareholders—Appraisal Demand.—The court rejected Glen Alden's argument that Schenley shareholders on the effective date of the merger who demanded appraisal of their shares under the Delaware corporation statute must be excluded from this class action. Glen Alden's theory is that where a majority shareholder possesses enough votes to effectuate a merger, the only minority shareholder with a potential federal claim is one who is misled into waiving his appraisal rights. This constitutes an attack on the merits of plaintiffs' claims and, therefore, is not relevant in a class action determination.

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2. Owners (other than defendants) of Schenley shares as of February 24, 1971 (the day preceding the public announce-

[1] 15 U. S. C. §§ 78j(b) and 78n(a).

[2] This class is denominated "Class I" in the complaint (¶ 1(c)(ii)(aa)).

ment of the merger plan) who between February 25, 1971 and June 17, 1971 sold such shares through the facilities of the New York Stock Exchange prior to the merger date ("Class II");[3]

3. Members of Class I who acquired their shares on or before September 1, 1968, the expiration date of the Glen Alden tender offer set forth in a prospectus dated August 8, 1968 ("Class IA");[4]

4. Members of Class II who acquired their shares on or before September 1, 1968 ("Class IIA").[5]

Classes IA and IIA (sought to be represented by plaintiffs Voege and Tunmore, who are also named among the representatives of Class I) are alleged to be third-party beneficiaries of a March 1968 agreement between Glen Alden and Lewis S. Rosenstiel, pursuant to which Glen Alden acquired Rosenstiel's substantial block of Schenley common stock at approximately $53.33, which was approximately twice that which was thereafter established for the 1971 merger. Voege and Tunmore claim in substance that they and an unspecified number of others who purchased Schenley common prior to September 1, 1968 were entitled upon the 1971 merger to receive the 1968 price thus obtained by Rosenstiel for his Schenley shares.[6]

Proposed Classes IA and IIA amount to subclasses of proposed Classes I and II: every member of Class IA is also a member of Class I; every member of Class IIA is also a member of Class II. There is no apparent need for these proposed subclasses. The existence of a theory of recovery (viz., the third-party beneficiary claim interposed by Voege and Tunmore) peculiar to the proposed subclasses is not sufficient, standing alone, to require separate class treatment.[7] Nor has any other persuasive reason for such treatment been advanced by any party. Moreover, Voege and Tunmore have not shown that their proposed subclasses are "so numerous that joinder of all members is impracticable."[8] Accordingly, the proposed subclasses will not be allowed at this time.[9]

As presently drawn, Class I would consist of all minority holders of Schenley on the effective date of the merger. That class would include a substantial number of persons who did not purchase their shares until *after* the public announcement of the merger plan on February 25, 1971. In contrast, the present plaintiffs bought in the period preceding the merger announcement, commenced the present litigation—in an effort to bar the merger—immediately on the heels of that announcement and (see Class II above) were sellers, not buyers, in the post-announcement period.[10] In the circumstances plaintiffs may not represent those who bought Schenley stock on or after February 25, 1971.[11]

The overbreadth of Class I as defined by plaintiffs does not, however, require dismissal of the class allegations with respect to that class.[12] Rather, Class I will be deemed to be limited (as is Class II) to holders of Schenley as of February 24, 1971—the only difference between Classes I and II being that the members of Class II continued to hold their shares until the effective date of the merger while the mem-

[3] This class is denominated "Class II" in the complaint (¶ 1(c)(ii)(b)).

[4] This class is denominated "Class III" in the complaint (¶ 1(c)(ii)(c)).

[5] This class is denominated "Class IV" in the complaint (¶ 1(c)(ii)(d)).

[6] Judge Lasker, in denying a preliminary injunction sought by Voege and Tunmore, noted that Glen Alden in fact offered in August 1968 to acquire the Schenley common shares held by Voege and Tunmore and their proposed classes at a price substantially equivalent to that paid for Rosenstiel's shares. However, Voege and Tunmore and those they seek to represent elected to decline that offer. *Voege v. Smith,* 329 F. Supp. 180, 184 (S. D. N. Y. 1971).

[7] *Cf. Northern Natural Gas Co. v. Grounds,* 292 F. Supp. 619, 634 (D. Kan. 1968), *aff'd in part and rev'd in part on other grounds,* 441 F.2d 704 (10th Cir.), *cert. denied,* 404 U. S. 951 (1971).

[8] Fed. R. Civ. P. 23(a)(1). *See, e.g., DeMarco v. Edens,* 390 F. 2d 836, 845 (2d Cir. 1968); *Deyle v. Davis,* 16 F. R. Serv. 2d 862 (D. Vt. 1972) (Waterman, J.).

[9] Voege and Tunmore (together with other plaintiffs) remain as representatives of Class I. Should they hereafter establish the requisite numerosity of the alleged third-party beneficiaries of the Rosenstiel-Glen Alden agreement and further establish that the interests of that group are not being adequately protected, they may reapply to the Court for subclass designation.

[10] None of the presently named plaintiffs was actually a seller during this period—all of them having held their shares until the effective date of the merger. However, intervenor Ben Grais was such a seller and, since his application to intervene is hereinafter to be granted, he is treated here as a plaintiff.

[11] Fed. R. Civ. P. 23(a)(3), (4). *Cf., e.g., Free World Foreign Cars, Inc. v. Alfa Romeo, S. p. A.,* 55 F. R. D. 26, 28-29 (S. D. N. Y. 1972); *Lesch v. Chicago & E. Ill. R. R.,* 279 F. Supp. 908, 911 (N. D. Ill. 1968).

[12] *See Dolgow v. Anderson,* 43 F. R. D. 472, 492 (E. D. N. Y. 1968).

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bers of Class I elected to sell their shares prior to that date.[13]

Defendants argue that Class I, even as above limited, continues to be too broad insofar as it fails to exclude those Schenley shareholders who have demanded appraisal of their shares pursuant to the Delaware corporation statute. The argument is to the effect that where, as here, a majority shareholder *itself* possesses sufficient voting power to effectuate a merger, the only minority holder with a potential federal claim is one who has been misled into foregoing his appraisal right. The gist of defendants' argument thus is that no claim upon which relief can be granted has been stated as to those members of Class I who have demanded appraisal and who thus have undeniably not been misled into waiving their appraisal rights.[14] Such an attack on the merits of plaintiffs' claim is out of order on a motion for class action determination.[15]

Equally lacking in substance is defendants' further argument that this action may not be prosecuted as a class action until plaintiffs have shown that there is a substantial possibility of their prevailing on the merits. That this Court, in *Voege v. Smith*,[16] and the Delaware Court of Chancery, in *David J. Green & Co. v. Schenley Industries, Inc.*,[17] denied applications for preliminary injunctions against the Schenley-Glen Alden merger does not render any less controlling here the recent and definitive pronouncement of the Second Circuit in *Eisen v. Carlisle & Jacquelin (Eisen III)*,[18] barring inquiry into the merits upon a motion for class action determination.[19] The above issues having been resolved, it is clear that the present action is maintainable as a class action on behalf of Classes I and II.

Class I comprises an aggregate of about 16,000 persons; Class II comprises an estimated 4800 persons. Impracticability of joinder is obvious.[20] The members of these two classes can be readily identified from Schenley's stock transfer records and are not so large as to be unmanageable.[21]

At the core of the wrongs alleged on behalf of each of the classes is the claimed scheme, said to have been carried out over a three-year period culminating with the alleged false and misleading proxy statement, to depress the market in Schenley shares by concealing Schenley's true financial condition, in order to enable Glen Alden to acquire the minority interest in Schenley for an inadequate consideration. There can be no doubt that the requirements of Rule 23(a)(2)-(3) are met as to both of the classes.[22]

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[13] This difference does not appear to require separate classes. Certainly there is no antagonism or conflict of interest between Classes I and II such as would preclude common representation. However, no apparent harm is done by separating Classes I and II and plaintiffs need not under the circumstances amend their complaint to allege a single class.

[14] In support of their argument that no claim has been stated as to those who demanded appraisal, defendants rely principally upon *Rosenblatt v. Northwest Airlines, Inc.*, 435 F. 2d 1121 (2d Cir. 1970), and *Swanson v. American Consumer Indus., Inc.*, 415 F. 2d 1326 (7th Cir. 1969). While, as defendants note, *Rosenblatt* specifically discusses the situation of the minority holder who loses his appraisal right by virtue of a misleading proxy statement, *see* 435 F. 2d at 1124, the Court does not appear to have held that the minority holder who does demand appraisal can have no federal claim. See particularly 435 F. 2d at 1124 n. 3. And the *Swanson* court's citation of and quotation from *Laurenzano v. Einbender*, 264 F. Supp. 356 (E. D. N. Y. 1966), appears to be a rejection of defendants' argument. *See* 415 F. 2d at 1332 & n. 6. Further, it would be anomalous if the existence of a claim under the Securities Exchange Act could be made to depend on the absence of or lack of resort to a state appraisal remedy. *See* 15 U. S. C. §§ 78aa, 78bb(a); *see also J. I. Case Co. v. Borak*, 377 U. S. 426, 433-35 (1964); *Swanson, supra* at 1333; *Voege v. American Sumatra Tobacco Corp.*, 241 F. Supp. 369, 375 (D. Del. 1965); *Eagle v. Horvath*, 241 F. Supp. 341, 3~~44~~-45 (S. D. N. Y. 1965). Nor can it be said on this record that those who have demanded appraisal have made a binding election of remedies precluding prosecution of the present action on their behalf.

[15] *E.g., Eisen v. Carlisle & Jacquelin*, Nos. 72-1521, -30934 (slip op. at 3236-37) (2d Cir., May 1, 1973) ("Eisen III"); *Miller v. Mackey Int'l, Inc.*, 452 F. 2d 424, 427-30 & nn. 4-5 (5th Cir. 1971); *Kahan v. Rosenstiel*, 424 F. 2d 161, 169 (3d Cir.), *cert. denied*, 398 U. S. 950 (1970); *Free World Foreign Cars, Inc. v. Alfa Romeo, S. p. A.*, 55 F. R. D. 26, 28 & n. 1 (S. D. N. Y. 1972).

[16] 329 F. Supp. 180 (S. D. N. Y. 1971).

[17] 281 A. 2d 30 (Del. Ch. 1971).

[18] Nos. 72-1521, -30934 (2d Cir., May 1, 1973).

[19] *Accord, e.g., Miller v. Mackey Int'l, Inc.*, 452 F. 2d 424 (5th Cir. 1971); *Kahan v. Rosenstiel*, 424 F. 2d 161 (3d Cir.), *cert. denied*, 398 U. S. 950 (1970); *Free World Foreign Cars, Inc. v. Alfa Romeo, S. p. A.*, 55 F. R. D. 26 (S. D. N. Y. 1972).

[20] *Green v. Wolf Corp.*, 406 F. 2d 291, 298 (2d Cir. 1968), *cert. denied*, 395 U. S. 977 (1969).

[21] *Berland v. Mack*, 48 F. R. D. 121, 127 (S. D. N. Y. 1969).

[22] *E.g., Green v. Wolf Corp.*, 406 F. 2d 291, 299-300 (2d Cir. 1968), cert. denied, 395 U. S. 977 (1969); *Weiss v. Tenney Corp.*, 47 F. R. D. 283, 293 (S. D. N. Y. 1969); *Dolgow v. Anderson*, 43 F. R. D. 472, 488-89 (E. D. N. Y. 1968); 3B J. Moore, Federal Practice ¶ 23.06-2, at 325-326 (2d ed. 1969).

Similarly, with Class I redefined to eliminate post-announcement purchasers, the Court is assured that the plaintiff representatives share common interests with their classes. Nor is there any reason to suppose that plaintiffs and their counsel will not vigorously prosecute this action. Accordingly, the requirement of adequacy of representation[23] is also met.[24]

The Court is also satisfied that common questions prevail over individual questions and that a class action is superior to other methods for adjudication of the controversy.[25]

COSTS OF NOTICE

Plaintiffs request that the Court hold an evidentiary hearing directed to the allocation of the costs of notice to class members under Rule 23(c)(2), urging that such a hearing would demonstrate the apparent merit of plaintiffs' claims and that such a demonstration would justify imposition of the costs of notice entirely or substantially on defendants. *Eisen III* requires rejection of plaintiffs' argument in this respect.[26] Plaintiffs must bear the costs of notice for the present, subject to their ultimate taxation in accordance with such orders as may be entered upon final disposition of the action.[27]

MOTIONS FOR INTERVENTION

Intervenor Ben Grais acquired Schenley stock in the period prior to the announcement of the Schenley-Glen Alden merger and sold his shares during the interval between that announcement and the effective date of the merger. Mr. Grais moves to intervene as a representative of Class II and has, in a complaint in intervention, adopted all the pertinent allegations of the main complaint. As has previously been noted, none of the presently named plaintiffs was actually a seller in the post-announcement period. Thus, absent amendment of the complaint to merge Classes I and II into a single class, intervention by Mr. Grais or another post-announcement seller is essential to the maintenance of this action on behalf of such sellers: only *members* of a class may maintain a class action.[28] Mr. Grais' motion is granted.[29]

Intervenors Walter and Mary Hughes bought Schenley stock in 1969 and continued to hold it through the effective date of the merger. The Hughes, unlike any of the presently named plaintiffs, demanded appraisal of their shares pursuant to the Delaware corporation statute. They move to intervene as additional representatives of Class I. Defendants do not oppose this motion as such. Rather, defendants have argued only that no shareholder who demanded appraisal may properly be included in Class I (on the premise that no such person can have any federal claim). Defendants' argument in this respect having been rejected, the motion of Mr. and Mrs. Hughes to intervene is granted.[30]

Settle order on notice.

---

[23] Fed. R. Civ. P. 23(a)(4).

[24] *E. g., Feder v. Harrington*, 52 F. R. D. 178, 183 (S. D. N. Y. 1970); *Dolgow v. Ander-* 1968). *son*, 43 F. R. D. 472, 494 (E. D. N. Y.

[25] Fed. R. Civ. P. 23(b)(3). *See, e.g., Green* *v. Wolf Corp.*, 406 F. 2d 291, 300-01 (2d Cir. 1968), *cert. denied*, 395 U. S. 977 (1969); In re Cohen's Will, 51 F. R. D. 167, 174 (S. D. N. Y. 1970).

[26] While footnote 5 of the *Eisen III* opinion indicates that the general rule imposing costs of notice on class plaintiffs may not be absolute, see *Eisen III* (slip op. 3222-23), nothing in the circumstances of this case warrants deviation from that general rule. Indeed, plaintiffs would be required to bear the costs here even under the balancing approach of *Berland v.* *Mack*, 48 F. R. D. 121 (S. D. N. Y. 1969). Thus: (1) previous denials of preliminary injunctions leave the merit of plaintiffs' claims open to considerable doubt; (2) the costs of notice here will be but a minute portion of the recovery plaintiffs seek; (3) plaintiffs' counsel indicated upon the argument of this motion that imposition of costs of notice on plaintiffs would not compel termination of the action; (4) defendants' vigorous opposition to having this case determined a class action evidences a lack of desire on defendants' part for the *res judicata* effects which notice will achieve. *See generally, Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555, 568, 570 (2d Cir. 1968).

[27] *See Berland v. Mack*, 48 F. R. D. 121, 133 (S. D. N. Y. 1969).

[28] Fed. R. Civ. P. 23(a). *See, e.g., Free World* *Foreign Cars, Inc. v. Alfa Romeo, S. p. A.*, 55 (S. D. N. Y. 1972). F. R. D. 26, 28 & n. 4

[29] *See, e.g., McCausland v. Shareholders Man-* (S. D. *agement Co.*, 52 F. R. D. 521, 522-23 N. Y. 1971); *Gaddis v. Wyman*, 304 F. Supp. 713, 716 (S. D. N. Y. 1969).

[30] No separate subclass for those who demanded appraisal was sought in connection with the present motion. If in the future a separate subclass is deemed appropriate by any party, application may be made to the Court therefor. The Class I alleged in the complaint in intervention will of course be deemed to be limited to holders of Schenley stock as of February 24, 1971 in accordance with the disposition herein made as to Class I of the main complaint.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

DOROTHY L. COLE, et al.,

Plaintiffs,

-against-

SCHENLEY INDUSTRIES, INC., et al.,

Defendants.

- - - - - - - - - - - - - - - - - - -x

71 Civ. 1028
(R. O.)

PRE-TRIAL ORDER

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------------------------------X

DOROTHY L. COLE, et al., : (R.O.)

Plaintiffs, 71 Civ. 1028

-against- : PRE-TRIAL ORDER

SCHENLEY INDUSTRIES, INC., et al., :

Defendants.

---------------------------------X

I

Plaintiffs allege that jurisdiction of this class action is based on Section 27 of the Securities Exchange Act of 1934 ("1934 Act") (15 U.S.C. 78aa). The claims asserted arise under Sections 10(b) and 14(a) of the 1934 Act and the Rules and Regulations of the Securities and Exchange Commission ("SEC") promulgated thereunder. Jurisdiction of the common law claims asserted by the class is based on principles of pendent jurisdiction.

II

The parties have agreed that there is no need to amend the pleadings and that any materials set forth in answers to interrogatories or in this pre-trial order will not be objected to on grounds that such materials were not included in the pleadings.

III

The parties have agreed that the following facts are not in this dispute in this action, each party reservin

the right to object to the materiality and relevancy of such facts to the issues:

THE UNDISPUTED FACTS

1. Defendant Schenley Industries, Inc. ("Schenley") was incorporated in Delaware. It is engaged in the business of producing, importing and selling of alcoholic beverages.

2. Defendant Glen Alden Corporation ("Glen Alden") is a Delaware corporation. Between 1968 and 1971, through subsidiaries, Glen Alden has been engaged in a variety of businesses. Between August 30, 1968 and June 18, 1971, Glen Alden owned 86% of the common stock and at least 84% of the voting power of Schenley.

Between March 20 and August 30, 1968, Glen Alden purchased 6,887,089 shares of the 7,979,747 outstanding Schenley common shares from approximately 13,000 holders of such shares for $404,925,331 (an average of $58.80 per share) as follows:

> 1,417,689 shares were purchased from Lewis S. Rosenstiel ("Rosenstiel"), then Chairman of the Board of Schenley, and six other related sellers ("The Rosenstiel Group") on March 20, 1968, for cash of $75,610,080, an average of $53.33 per share.
>
> 110,000 shares were purchased by Glen Alden on the New York Stock Exchange on April 26, 1968, for cash of $5,851,208, an average of $53.20 per share.
>
> 5,359,400 shares were purchased through a tender offer on August 30, 1968, for which Glen Alden paid $357,293,300 face amount of its 6% Debentures which Glen Alden estimated had a debt discount of 25% less or $267,969,975 plus $46,448,129 in cash and incurred fees and expenses of $8,359,867, a total of $322,777,971

> or an average of $60.32 per share. This transaction is hereinafter referred to as the "Exchange Offer."

On May 10, 1971, defendant Rapid American Corporation ("Rapid") owned 63.3% of the ordinary voting power of Glen Alden.

3. At elections held between October 1, 1968 and June 17, 1971, Glen Alden caused to be elected defendants Isidore Becker, Bernard Goldberg, Paul Johnston, Walter Heinze, Howard Feldman, Milo Hopkins, Albert N. Greenfield, Russel Smith and David Chernow as directors of Schenley. Those defendants voted in favor of the merger of Schenley with Glen Alden which became effective on June 17, 1971. After June 17, 1971, Glen Alden and/or Rapid caused the election of all the directors of Schenley. Between 1965 and June 17, 1971, defendant Meshulam Riklis was a director, Chairman of the Board and Chief Executive of Glen Alden and a director, Chairman of the Board and President of Rapid; defendant Becker was a director and executive officer of Glen Alden and Rapid. Since on or about October 1, 1968, Becker was the Chief Executive Officer and Chairman of the Board of Schenley. While a director of Schenley, defendant Johnston was also a director of Glen Alden. Defendant Greenfield had been a director until May 1970 of a subsidiary of Rapid before becoming a director of Schenley and defendant Heinze while a director of Schenley was an executive officer of two subsidiaries of Glen Alden.

4. At December 31, 1970, Schenley had outstanding 7,991,777 shares of common stock; 2,538,864 shares of $1.40 Cumulative Convertible Preferred Stock ($1.40 Preferred) and 197,594 shares of Cumulative Preferred Stock ("Preferred

Stock"). The $1.40 Preferred was convertible into 9/10 of a share of common at the option of the holder.

5. Defendant Becker testified that, without prior discussion between the other directors of Glen Alden and before any written studies were made of the proposed merger, he and defendant Riklis, on February 24, 1971, recommended the terms of a proposed merger to the members of the Executive Committee of Glen Alden who approved the same. According to its minutes, the Committee was comprised of four directors, of which three were defendants Riklis, Becker and Johnston.

6. On February 25, 1971, a public announcement was made of the proposed reorganization of Schenley and the terms under which the latter would be merged with a wholly owned subsidiary of Glen Alden. Upon consummation of the merger, Schenley would become the wholly owned subsidiary of Glen Alden except for the Preference Stock. Each share of Schenley common stock was to be converted into $5.00 in cash and $30.00 principal amount of a new 7-1/2% Glen Alden Debenture ("Debentures") and each share of the $1.40 Preferred was to be converted into $4.50 in cash and a $27.00 principal amount of the Debentures.

According to Allen & Co., Inc., financial adviser to the Board of Directors of Schenley in connection with the proposed reorganization, the Debentures as modified on March 25, 1971, had a fair market value as of February 25,

1971 of approximately 80% of their stated principal amount. This valuation for the Debentures would result in a total consideration to the holders of Schenley common stock of approximately $29.00 per share and consideration to the holders of $1.40 Preferred of approximately $26.10 per share.

7. On February 25, 1971 the Schenley directors met, considered and unanimously approved the proposed reorganization "in principle" with "further authority to the officers to modify such terms and conditions in such manner as they in their discretion may deem necessary or desirable to effect such merger, all subject, however, to the receipt of an opinic of an investment banker to the effect that such terms and conditions, as finally determined, are fair and equitable to the shareholders of [Schenley]."

8. Defendant Chernow testified that prior to February 24, 1971 he had no knowledge that a proposal for the merger of Schenley and Glen Alden would be forthcoming from Glen Alden.

9. As shown by the March 25, 1971 minutes, Schenley's Board of Directors ratified the retention of Allen & Co., Inc. ("Allen' investment bankers, as "investment advisor" to Schenley. Stanley Shuman, a director and a member of Allen's Executive Committee, was present at that meeting of the Boa. l (Minutes, p. 3). Mr. Shuman recommended changes in the terms of the "reorganization" which defendant Becker, Chairman of Schenley Board, stated was agreeable to the "Executive Committee of

Glen Alden Corporation", of which Becker was a member. Mr. Shuman stated that the terms, as changed, were fair and equitable to the stockholders of Schenley and the Board unanimously approved the proposed "reorganization" and authorized the taking of the action necessary for its consummation.

10. The minutes of the March 25, 1971 meeting stated "attached is a statement furnished by Mr. Shuman . . . subsequent to the meeting . . . summarizing his remarks". The statement was a letter dated June 3, 1971. With the exception of the June 3, 1971 letter, the minutes of the Board of Directors of Schenley do not disclose that any other written study, analysis or report as to the fairness of the proposed reorganization was considered by the directors of Schenley prior to March 25, 1971.

11. Defendant Riklis testified that the amount of consideration to be given under the proposed reorganization for the Schenley common and $1.40 Preferred shares was determined mainly by (i) the quoted market prices of the shares on the New York Stock Exchange during a period of approximately two years preceding February 24, 1971, and (ii) the desire of defendant Riklis and Glen Alden to give the $1.40 Preferred an amount per share of about $26.00, which would be the approximate equivalent of what a holder of Buckingham Common Stock would have received had there been a distribution to Buckingham stockholders of the proceeds from the sale of Buckingham stock and the $32,000,000 of ca h and marketable

securities previously owned by Buckingham.

12. Pursuant to the proposed merger, Schenley was to merge with Glen Alden's newly-formed wholly-owned subsidiary that was organized solely for such purpose and thereupon Glen Alden would become the owner of all outstanding equity securities of Schenley, except the Preferred Stock which would remain unaffected by the merger. The reorganization made no change in the business of Schenley nor did it result in Schenley acquiring any new business or assets. Prior to and after the reorganization, Schenley and Glen Alden had not engaged in any similar business activities.

13. At the meeting of Schenley stockholders on June 17, 1971 the vote on merger was as follows:

	Shares	
	Common	1.40 Preferred
For the Merger	7,187,372 (6,887,089 owned by Glen Alden)	513,375
Against	200,406	547,711
Not Voting or Absent	591,969	1,459,137
Total Shares Outstanding	7,979,747	2,520,005
Vote	1 vote per share	1/10th of a vote per sha

The holders of approximately 910,000 Schenley shares objected to the reorganization and demanded appraisal under Delaware law. A total of 114,988 shares of common stock and 572,966 shares of $1.40 Preferred withdrew/or were dismissed from the appraisal proceedings.

14. A majority of the Schenley shares voting together having approved, the reorganization was declared effective on June 17, 1971 by the Board of Directors.

15. From January of 1966 to January of 1968, Richard Graham ("Graham") was either a vice president of defendant Rapid or assistant to defendant Riklis, the Chairman of its Board of Directors and its chief executive officer. Graham testified that during that period he prepared reports relating to Schenley "as part of a large program whereby Mr. Riklis, Rapid, McCrory (a majority-owned subsidiary of Rapid), and Glen Alden . . . had an interest in acquiring majority ownership in Schenley." Graham testified that Plaintiffs' Exhibit for Identification #5* is a true and correct copy of a report that was prepared by Graham and given to defendant Riklis.

16. Graham testified that he commenced the preparation of the Graham Report in late winter or early spring of 1966 and continued through February of 1967; he estimated it took "50 percent of his time for a period of six or seven months" (Graham, p. 36) during which he examined all the material

* Hereinafter all of plaintiffs' exhibits for identification will be referred to simply as "Exhibit ".

filed by Schenley and its subsidiaries with the Securities an. Exchange Commission (p. 39) as well as other source material described in his report.

17. In Sanders v. Riklis, a derivative stockholders suit instituted in the Supreme Court, New York County, in 1968, it was charged, among other things, that the $53.33 price per Schenley common share that Glen Alden had paid to the Rosenstiel Group and proposed to pay in its tender offer was excessive. In successfully opposing an attempt to enjoin the tender offer, Glen Alden submitted a May 2, 1968 affidavit of Bear, Stearns & Co., investment bankers ("Exhibit 6").

18. At the times stated below the unaudited balance sheets of Schenle. show that, excluding Buckingham, Schenley's curre trade account receivables, after reserves for allowances and doubtful accounts, amounted to:

(000 omitted)

12/31/67	$135,300
12/31/68	116,500
12/31/69	120,300
12/31/70	115,984
12/31/71	111,594

19. After the December 15, 1969 merger between Schenley and BHM, Buckingham became a wholly-owned subsidiary of Schenley. The latter received approximately $32,000,000 of cash and marketable securities that had formerly belonged to Buckingham and/or BHM.

20. At the times stated below, the inventory records of Schenley that were produced for plaintiffs' inspection (Cole 5) showed Schenley bulk in bond inventory (excluding Buckingham) amounted to:

(000 omitted)

12/31/67	$273,602
12/31/68	270,759
12/31/69	243,467
12/31/70	224,510
12/31/71	188,080
12/31/72	178,953

21. On November 13, 1970, Schenley entered into a letter of intent under which on February 26, 1971, it sold certain assets connected with its domestic wine business for $14,000,000, subject to adjustment.

22. Excluding Buckingham, Schenley's inventory of finished and in process case goods in relation to total inventory (which includes bulk in bond inventory) was as follows:

	Case Goods Inventory	Total Inventory
12/31/67	$26,868,000	$319,778,000
12/31/70	40,317,000	294,740,000
5/31/71	53,342,000	294,900,000
12/31/71	53,154,000	261,277,000
12/31/72	58,264,000	258,616,000

23. At December 31, 1970, Schenley, excluding Buckingham, had on hand cash and marketable securities of $65,816,000 as compared to $24,392,000 at December 31, 1967. At December 31, 1970, Schenley had on hand $13,784. 26 at cost of Glen Alden 6% Debentures. At December 31, 1970, its long and short-term debts to lending

institutions had decreased since December 31, 1967 by $27,500,000.

24. On or about March 23, 1971, Forbes Magazine quoted defendant Riklis as saying:

> "When we started out, Schenley was $160 million into the banks and had $30 million in cash. Three years later, Schenley has got maybe $80 million in cash, and it's into the banks for $100 million. That's a $60-million reduction in the line, and a $50-million increase in the cash—$110 million difference in cash already. With the sale of Schenley's Buckingham subsidiary [under a Federal Trade Commission order], it'll be a $230-million difference. Next year, without Buckingham, Schenley will make as much as it made with Buckingham three years ago, and I'll be sitting with $200 million in cash. That's what I saw in Schenley—the great possibility of its being a huge cash generator, generating more cash than I put into it."

25. The May 14, 1970 agreement between Glen Alden and John Hancock Mutual Life Insurance Company ("John Hancock") amended the January 31, 1969 agreement between the parties to permit the extension of the due date on the General Bank Notes described in paragraph 26 below. If said Notes were not paid in full prior to February 1, 1971, Glen Alden was to pay John Hancock additional interest at the rate of one-half percent per annum on the outstanding indebtedness due the latter from Glen Alden.

26. In 1970, Glen Alden extended to February 1, 1971, $53,000,000 due on June 30, 1970 under a $133,000,000 credit agreement with a group of banks hereinafter called "General Bank Notes." As expressed in the January 27, 1971 minutes, it was the "considered opinion" of the Board of Directors that Glen Alden was not in a position to pay the General Bank Notes in full on February 1, 1971, but was able to pay $30,000,000 on account. It was the best estimate of the Board that the earliest date by which the balance of $22,977,000 would be paid was August 1, 1971 and the due date was extended accordingly.

27. The balance of $22,977,000 was paid on June 18, 1971, the day after the reorganization was consummated. In May 1970, Glen Alden borrowed $20,000,000 from the same banks, which was due on February 1, 1971. In January 1971, the banks had agreed to extend the maturity to August 1, 1971.

28. Schenley purchased from Glen Alden for $81,300,000 the $101,606,000 of Glen Alden's 7-1/2% Debentures and Schenley provided the $16,934,000 in cash that together with the Debentures were exchanged in the reorganization for the common and $1.40 Preferred shares held by the Schenley Minority Stockholders.

29. Between January 1, 1971 and June 30, 1971, Glen Alden did not obtain a new term loan from any lending institution in the amount of $60,000,000 or in any lesser sum.

30. Between January 1, 1971 and May 21, 1971, the 6% Glen Alden Debentures, which were given in 1968 in exchange, by Glen Alden, for the Schenley common, had a market value which ranged from 62-1/4 to 53-1/4 per $100 in face amount, as shown by the quoted prices of the 6% Debentures on the New York Stock Exchange. On May 20, 1971, the closing price was 57-1/2.

31. The 6% Debentures were rated "B" in investment quality by Moody's Financial Service and in Moody's Industrial Manual

> "Bonds which are rated B generally lack characteristics of the desirable investment. Assurance of interest and principal payments or of maintenance of other terms of the contract over any long period of time may be small." (Moody's Industrial Manual, 1970, pp. v, vi)

32. The 7-1/2% Debentures were also rated "B" by Moody's. In 1971, their market prices ranged from 67-1/2 to 79-3/4. In June and July 1971, the bonds were quoted on a when-issued basis at 68.

33. The 1969 and 1970 audited financial statements of Glen Alden stated:

D. INTANGIBLES AND FRANCHISES

Intangibles represent the excess of unallocated cost of investments over equity in net assets of Schenley ($85,533,212) and other subsidiaries (1969—$34,193,763; 1970—$43,044,733). These net excess acquisition costs have been recognized by the management of Glen Alden as being similar in nature to intangibles which have not declined in value since acquisition. Accordingly, at the respective dates of acquisition, the management of Glen Alden adopted the policy of not amortizing these excess purchase costs so long as there is no diminution in value of the related investments.

Other intangibles are being amortized over periods not exceeding twenty years.

Franchises consist of Schenley contracts to import whiskeys, liquors, and other distilled spirits which, in the opinion of management, have continuing value and accordingly are not being amortized. //

34. The Rapid-American October 19, 1971 Prospectus at page 9 stated that the book value of Rapid common stock at January 31, 1971 was $23.79 per share and that such book value was:

> "... based upon common shareholders equity of $158,083,000 which includes 'excess of cost of investments over related equities' of $220,120,000 or 33.12 per share. In the opinion of the respective managements of McCrory and Rapid, such excess costs are similar in nature to intangibles which have not declined in value since acquisition of the related equities. See ... Note 5 of Notes to Financial Statements of Rapid ... included elsewhere herein."

35. The October 6, 1972 Proxy Statement of Glen Alden at page 25 stated that the book value of the Glen Alden common stock was $7.80 per share at December 31, 1971 and that:

"(a) The book value per share of Glen Alden Common Stock set forth herein is based upon common stockholders' equity of $136,297,000, which includes "excess of cost of investments in subsidiaries over related equities" of $102,174,000, or $5.85 per share. The book value per share of Rapid Common Stock set forth herein is based upon common shareholders' equity of $190,456,000, which includes "excess of cost of investments over related equities" of $193,479,000, or $26.91 per share. In the opinion of the respective managements of Glen Alden and Rapid, such excess costs are similar in nature to intangibles which have not declined in value since acquisition of the related equities. See Note D of Notes to Financial Statements of Glen Alden and Note 5 of Notes to Financial Statements of Rapid."

36. The Prospectus of Glen Alden dated August 8, 1968 contained an unaudited pro forma condensed balance sheet at pages 62-63 that purported to reflect the effect on Glen Alden's March 31, 1968 balance sheet of the proposed acquisition of 100% of Schenley's common stock. Note 4 to the balance sheet stated:

> "Glen Alden does not have sufficient information at the present time to make an allocation of the excess of cost of investment in Schenley over equity in net assets (estimated to be $148,580,000, based upon May 31, 1968 consolidated balance sheet of Schenley). To the extent any amount is allocated (a) to property, plant and equipment, it will be written off over the estimated remaining lives of such assets and (b) to intangibles, it may or may not be amortized depending on whether any diminution in value is anticipated."

37. At August 30, 1968 and at December 31, 1970, Glen Alden allocated the following amounts as the excess of cost over equity in net assets of Schenley of its investment in Schenley common shares:

Intangibles	$85,583,212
Franchises	50,000,000
	$135,583,212

or $19.70 per share of Schenley common stock owned by it.

By reason of its investment in Schenley common shares, Glen Alden, at August 31, 1968, and at December 31, 1970, as shown in its 1970 10-K, reflected the amount of its equity in the net assets of Schenley at $268,656,047 and $296,393,808 which amounted to $38.95 and $43.02 per share, respectively. The total per share was $58.65 at

August 31, 1968 and $62.72 at December 31, 1970.

38. At May 31, 1971, Schenley reflected its plant and property at $108,502,000 less accumulated depreciation of $62,415,000 or a net of $46,087,000. It made gross additions and retirements to its plant and property as follows:

Year Ended		Gross Property Additions	Gross Property Retiremen
August 31,	1963	3,484,619	2,596,707
	1964	3,725,078	712,936
	1965	6,607,136	1,383,639
	1966	4,366,874	2,029,927
	1967	5,765,940	985,125
	1968	7,962,908	1,497,412
December31,	1969	4,849,136	4,505,531
	1970	4,790,820	2,742,808
	1971	4,990,242	17,120,382
		46,542,753	33,574,467

NET FIXED ASSETS 12/31/71	46,146,804
GROSS FIXED ASSETS	107,637,418

39. The financial statements of Schenley for the year ended August 31, 1968, four months ended December 31, 1968, and the calendar years ended December 31, 1969 and 1970, do not reflect any writedowns or writeoffs of Schenley's inventory of bulk whiskeys, other spirits and wines or of other products, materials and supplies.

40. The financial statements of Schenley for the calendar year ended December 31, 1971 reflect:

(a) Extra Ordinary writedowns of inventory as follows:

(000 omitted)

	Before Taxes	After Taxes
Used Cooperage	$13,547	$ 7,044
Light Whiskey	7,193	3,740
Americana Bottling Supplies	1,000	520
Aged Spirits	183	95
	$21,923	$11,399

(c) No writedowns on bulk inventories of Kentucky Bourbons whose stated cost at December 31, 1971 was $97,884,300; non Kentucky Bourbon ($22,494,300); Tennessee Whiskey ($4,719,300) Brandy ($11,390,700); Canadian Whiskey ($26,648,200) or, of Bulk Scotch ($8,622,000) (Cole 14).

41. The following chart shows the amount of Schenley's inventories, as of the dates indicated, of certain bulk whiskeys for which new production had been discontinued and which were being phased out without replacement:

(000 omitted)

	Dec. 31, 1970	Dec. 31, 1971
Non-Kentucky new wood	26,780	22,495
Corn Whiskey	6,584	4,636
Total	33,364	27,131

42. Schenley's tax liabilities of approximately $13,100,000 on its 1971 gains from the sale of Buckingham and other assets were reduced by approximately $9,000,000 because of writedowns of about $20,000,000 on its inventories of empty barrels, light whiskey and supplies and equipment.

43. Schenley paid the prime interest rate on its short-term debt in the years 1969 through 1971. During the calendar year 1970, the prime interest rate averaged 8.2% on Schenley's outstanding short-term debt. By May of 1971, the prime rate had fallen to about 5.29% and the interest rate on prime commercial paper was approximately 5%. At December 31, 1970, Schenley's short term debt was $110,750,000. At March 31, 1971, short-term debt was

$87,300,000.

44. In each of the calendar years 1972 and 1973, Schenley paid dividends to Glen Alden of $26,000,000. In 1970 and in the first quarter of 1971, Schenley paid dividends on its common stock and $1.40 Preferred Stock of 35¢ per share. In 1970 total dividends paid on such shares and the Cumulative Preferred Stock amounted to approximatel $14,440,000.

45. The minutes of the Board of Directors of Schenley for 1970 and 1971 do not show that the directors of Schenle considered or discussed increasing the dividend on the Schenley common stock.

46. There is set forth below, to the extent produced by Schenley, the bulk sales of in bond inventory, their cost and gross profit.

(000 omitted)

Year Ended

	8/31 or 12/31 1968	12/31 1969	12/31 1970	12/31 1971
Sales	$18,440	$24,328	$19,513	$8,924
Cost of Sales		18,035	13,068	6,922
Gross Profit		6,293	6,445	2,002

47. Three applications to enjoin the merger were made in 1971. All of these applications were denied.

48. The following is a summary of market information for Schenley common and preferred stock for the times set forth therein.

Trading History of Schenley Common Stock

1960-1970

	High	Low
1960	24 7/8	13 1/4
1961	23 1/4	14 1/2
1962	18 1/4	10 3/8
1963	15 3/4	12 3/4
1964	16	12 5/8
1965	26 5/8	14 7/8
1966	29 3/8	16 5/8
1967	46 1/4	20 1/2
1968	57	32 3/8
1969	44 3/4	20 3/4
1970	28	19 1/4

1970 TRADING VOLUME STATISTICS

	Common	$1.40 Convertible Preferred	Common & Convertible Preferred
Common Shares Outstanding	7,991,777	2,535,764	10,527,541
Shares held by Glen Alden	6,887,089	0	6,887,089
Remainder	1,104,688	2,535,764	3,640,052
Number of Stockholders	8,249	9,281	17,530
Average Number of public per Stockholder	134	273	208
1970 Trading Volume	428,500	876,300	1,304,800

TRADING VOLUME FOR SCHENLEY

	Common	$1.40 Convertible Preferred	Common & Convertible Preferred
1970			
January	19,100 Shs.	29,000 Shs.	48,100 Shs.
February	31,200	37,900	69,100
March	28,200	88,100	116,300
April	16,200	74,500	90,700
May	35,100	60,300	95,400
June	32,600	49,000	81,600
July	24,700	54,500	79,200
August	25,400	69,800	95,200
September	64,800	119,100	183,900
October	89,400	163,600	253,000
November	20,900	70,400	91,300
December	40,900	60,100	101,000
Total 1970	428,500	876,300	1,304,800
1971			
January	66,500	156,700	223,200
February	75,900	180,700	256,600

MONTHLY PRICES FOR SCHENLEY COMMON AND CONVERTIBLE PREFFERED

	Common		$1.40 Convertible Preferred	
	(High)	(Low)	(High)	(Low)
1969				
December	23 3/4	20 3/4	21 1/4	18 1/4
1970				
January	24 7/8	20 1/8	21 3/4	18
February	24	20 1/2	21 3/8	18 1/4
March	24 1/2	22	22	19 3/4
April	25	21	22 1/4	18 1/2
May	21 7/8	19 1/4	19 5/8	17 1/4
June	21 1/2	19 1/2	19 1/4	17 5/8
July	22	19 3/4	19 1/2	17 1/2
August	23 7/8	20 1/4	21	18
September	27	21 1/2	24 1/2	19 1/2
October	28	25	25	22 3/4
November	26 1/8	23 5/8	23 3/4	21 1/4
December	27	24 3/4	24 1/8	22
1971				
January	29	25	26 1/4	23 1/4
February	31 7/8	28 5/8	28 1/2	25 7/8

49. The following is a summary of the market prices of the common stock of the Buckingham Corporation and BHM Industries, Inc., for the times set forth therein.

	High	Low
Calendar Year:		
1965	$16 15/16	$12 1/8
1966	17 7/8	11 7/8
1967	22	13 1/2
1968	30 3/4	18 7/8
1969		
1st Quarter	31 3/4	26 1/8
2nd Quarter	29 3/4	21 3/4
3rd Quarter	23 3/4	19
4th Quarter thru November 14	22 3/4	19 3/4
November 14, Closing Price	$21 7/8	

50. On May 10, 1971, Schenley sold its 100% stock interest in Buckingham to Northwest for a price of $120,000,000, consisting of $103,000,000 in cash and $17,000,000 principal amount of 9-1/2% notes of Northwest maturing March 1, 1979. The purchase price was subject to reduction after December 31, 1975 by reason of Schenley's guarantee of a specified amount of "depletions" (i.e., case sales by wholesalers to retailers) of Cutty Sark Scotch whisky and other Buckingham products during the five years ending December 31, 1975. In connection with the sale, Schenley and Glen Alden guaranteed $23,000,000 principal amount of Northwest 9-1/2% notes maturing March 1, 1986 which were simultaneously sold by Northwest to three insurance companies at their principal amount to finance part of the cash portion of the purchase price.

IV

PLAINTIFFS' STATEMENT OF DISPUTED FACTS

Defendants dispute the following ultimate facts:

1. Prior to February 24, 1971 and between February 24, 1971 and June 17, 1971, defendants, Schenley, Glen Alden, Riklis, Becker, Goldberg and Chernow, knew, or should have known, that:

(a) Excluding Buckingham, Schenley would have on hand by the end of May 1971, $191,135,000 of cash and marketable securities as compared to $24,392,000 of similar assets as of December 31, 1967. Schenley's net quick assets (cash, marketable securities and receivables, less total current liabilities would amount to $136,500,000 at May 31, 1971 as compared to (-$35,000,000) at December 31, 1967. Between December 31, 1967 and the end of May 1971, Schenley increased its cash and marketable securities by $166,700,000 and reduced its short and long-term debts by $48,700,000, an overall improvement of over $215,000,000. Its net worth went from $320,500,000 to $423,800,000.

(b) Of the $191,135,000 of cash and marketable securities at least $115,000,000 and $140,000,000 or more was not needed for the operation of Schenley's business.

(c) At Schenley's request, the restrictions on its loan agreements would be amended so as to permit Schenley to pay out as much as $115,000,000 in the proposed reorganization in order

to acquire the Schenley $1.40 Preferred stock and Common stock held by persons other than Glen Alden ("Minority Shareholders").

(d) When the proposed reorganization became effective, Schenley was to provide the $16,934,000 in cash as well as additional cash of $81,285,000 in a purchase from Glen Alden of $101,600,000 of its newly issued 7-1/2% Debentures. In the reorganization, the Debentures and the $16,934,000 in cash were to be paid to the minority holders of Schenley Common stock and the holders of all the Schenley $1.40 Preferred stock.

2. On the basis of Plaintiffs' Exhibit 5, Glen Alden knew, prior to March 1968, the following:

(a) Schenley could realize $130,000,000, after taxes, from the liquidation of its excess inventories over an eight-year period;

(b) Schenley could realize $30,000,000 from the reduction of its excess receivables over a four-year period;

(c) Schenley could realize $45,000,000, after taxes, from the then proposed sale of its 52% interest in its subsidiary, The Buckingham Corporation ("Buckingham");

(d) Schenley's ability to realize this $205,000,000 over an eight-year period made it

valuable to Glen Alden as a bank, enabling Glen Alden to (i) pay the term debt incurred in its purchase of the controlling position in Schenley; (ii) scale down Schenley's existing indebtedness; and

(e) Schenley's value to Glen Alden as a bank was in addition to its value as an operating company.

3. On the basis of Plaintiffs' Exhibit 6, the May 2, 1968 appraisal report of Bear, Stearns & Co., Glen Alden knew, at least by the date of the report, the following:

(a) Schenley could realize $120,000,000 from the reduction of its excess inventories over a four to seven-year period;

(b) Schenley could realize $20,000,000 from the reduction of its accounts receivable;

(c) Schenley could reduce its liquid assets by $30,000,000;

(d) Schenley could make these $170,000,000 in reductions in its net working capital without any material effect upon its earning power; and

(e) As a result of these reductions of $170,000,000 in net working capital, Glen Alden's effective cost of the purchase of Schenley would be reduced by roughly 40%.

(f) Schenley's investment in 52% of the common stock of Buckingham might well be valued at about $27.00 per share if there were not a dominant controlling shareholder.

4. It was the opinion of defendant Chernow, the chief financial officer of Schenley, in mid-1968, that Schenley had inventory and accounts receivable that were in excess of its requirements and that as of December 31, 1968, such excess amounted to $75,000,000 and $20,000,000, respectively.

5. When Glen Alden took over the management of Schenley in 1968, a Liquidation Program was immediately instituted to convert into cash the 1967 excess bulk whiskey inventory and other marginally profitable inventory items and assets. Trade accounts receivable of $135,300,000 were to be reduced immediately by $20,000,000 to $30,000,000 by requiring prompt payment of outstanding accounts, the return of previously shipped goods and by limiting future shipments to current needs of wholesalers. The marketable securities of $30,000,000 which were owned at the end of 1967 by Buckingham, Schenley's 52% owned subsidiary, were not needed to operate the latter's business but could not be transferred to Schenley so long as the 48% minority interest was outstanding.

6. The purpose of the Liquidation Program was to create the fund or "bank" of $170,000,000 to $205,000,000 for exclusive use by and for the benefit of Glen Alden to reduce the latter's debts and scale down Schenley's debt.

7. The fund of $205,000,000 and more was realized sooner than expected. Through a December 1969 reorganization, Schenley acquired the 48% minority interest in Buckingham, as well as $32,000,000 of Buckingham's surplus cash and marketable securities. By December 31, 1970, Schenley had reduced its trade accounts receivable by $19,300,000. In October and November 1970, Schenley had committed the sale of its marginally profitable wine business for about $14,000,000 and the sale of Buckingham for $120,000,000. By December 31, 1970, Schenley had reduced its 1967 excess bulk whiskey inventories by $72,100,000.

8. The Liquidation Program with respect to inventories of bulk whiskies was operative from mid-1968 through 1971 and continued to be operative thereafter with respect to Kentucky and non-Kentucky new wood and old wood whiskies as well as bulk scotches. After December 31, 1971, Schenley continued its program of increasing its inventory of finished and in process case goods.

9. The proposed reorganization would confer no economic benefit of any kind upon Schenley and would not serve any need or plausible business purpose of Schenley.

10. But for the proceeds derived from its sale of the 7-1/2% Debentures to Schenley in the reorganization, Glen Alden would have been unable to raise the funds necessary to pay its current debts to banks and other lending institutions.

11. Between December 31, 1968 and June 17, 1971 (and thereafter), in the various respects noted to in answers to defendants' interrogatories 25 and 36(a)(vii) (paragraph 3 of answers on pages 35-B and 36), the management of Glen Alden was of the opinion that Glen Alden's 1968 investment in 6,887,089 Schenley common shares at a cost of $404,925,331 or $58.80 per share had not declined in value since acquisition. By December 31, 1970, the value of its investment had increased to $62.72 per share.

12. For the purpose of the proposed reorganization, defendants fixed the value of the Schenley Common and $1.40 Preferred at $29.00 and $26.10 per share, respectively, by the market prices of Schenley's Common shares and by their desire to give the $1.40 Preferred a value of about $26.00 per share, the approximate equivalent of what the minority holders of Buckingham common stock would have received had 100% of Buckingham common been sold to Northwest Industries in 1969 for $120,000,000 and had Schenley distributed to Buckingham's shareholders the $32,000,000 of surplus liquid assets plus the $120,000,000.

13. In finding the terms of the merger were fair and equitable, Glen Alden, the directors of Schenley and their respective financial advisers:

(a) Failed to give weight to the $140,000,000 or more of Schenley's liquid assets that were not needed for the operation of its business;

(b) its past and future earnings; and

(c) Glen Alden's opinion that the value of its investment in Schenley had not declined since acquisition.

14. The directors of Schenley made no investigation or study of the feasibility or fairness of the proposed reorganization prior to or after February 24, 1971.

15. The terms of the proposed reorganization were fixed by defendants Riklis and Becker on behalf of Glen Alden and there were no negotiations between Glen Alden and Schenley as to those terms.

16. The only change in the terms of the reorganization as proposed by Glen Alden that was made by Allen & Co., Inc., and approved by Schenley and Glen Alden, was one in favor of Glen Alden that eliminated the seniority of the 7-1/2% Debentures over the outstanding 6% Debentures of Glen Alden.

17. Schenley failed to give Allen & Co., Inc., its financial adviser, who opined that the terms of the proposed reorganization were "fair and equitable", accurate information concerning (a) the existence and amount of Schenley's excess current assets; (b) Schenley's 1969, 1970 income and pro forma income; (c) the size of its bulk whiskey inventory for use in blended whiskey; and Schenley's overhead reduction program and 1968 transitional costs; and that Schenley's 1971 earnings without Buckingham would exceed its 1968 earnings with Buckingham.

18. In evaluating the fairness of the merger, Allen & Co., Inc. did not consider the opinion of Glen Alden's management as to the value of its investment in Schenley described in paragraph 11 above.

19. It was not the intention of Glen Alden or Schenley to have Schenley apply any significant portion of the proceeds from the sale of Buckingham to the reduction of Schenley's short-term notes payable which, at March 31, 1971, amounted to $87,300,000.

20. Schenley's financial statements:

(a) overstated by at least $9,000,000 the estimated income tax payable on the gain from the sale of Buckingham and other assets;

(b) understated Schenley's income for the years 1969, 1970 and 1971 by failing to disclose non-recurring excess pre-tax costs attributable to the use of redistilled neutral grain spirits of $1,973,000, $4,163,900 and $3,795,000, respectively;

(c) showing the pro forma effect on Schenley's 1970 income of the sale of Buckingham, failed to disclose facts concerning current interest rates and interest income and non-recurring expenses which would have increased Schenley's pro forma income by at least $9,000,000 before taxes; and

(d) failed to disclose Schenley's inventory of corn whiskey carried at $27,300,000 at August 31, 1968 was overstated because no sales of a significant amount in bulk or in cases could be anticipated. Accordingly, its book value should have been reduced in 1968 by approximately two-thirds to reflect its value as redistilled neutral grain spirits. The effect of such a writedown would have increased Schenley's profits after 1968 and reduced Schenley's 1968 income taxes by a substantial amount.

21. In response to requests from the Securities and Exchange Commission prior to June 17, 1971, Schenley failed to supply accurate information concerning the volume,

frequency and profitability of its bulk sales of spirits in 1969, 1970 and 1971 (see Undisputed Fact #46).

22. During the periods shown below, Schenley, operating independently of Buckingham and BHM, conducted its business operations with cash (or its equivalent) on hand as follows:

<u>August 31, 1967</u>

Cash	$14,469,000
Certificates of Deposits ("CDs") and Marketable Securities	-0-

<u>August 31, 1968</u>

Cash	$16,117,000
CDs and Marketable Securities	-0-

<u>December 31, 1967</u>

Cash	$21,891,000
CDs and Marketable Securities	2,600,000

<u>December 31, 1968</u>

Cash	$20,681,000
CDs and Marketable Securities	-0-

<u>June 30, 1969</u>

Cash	$19,849,000
CDs and Marketable Securities	10,380,000*

<u>September 30, 1969</u>

Cash	$20,936,000
CDs and Marketable Securities	11,604,779*

* Glen Alden 6% Debentures, carried as a current asset, later reclassified as a non-current investment.

23. At no time before August 1, 1968 or between August 1, 1968 and June 17, 1971, did Schenley or Glen Alden disclose to Schenley's stockholders in a proxy statement or otherwise, or to the financial community, the foregoing disputed facts or the undisputed facts described in paragraphs Nos. 5, 11, 15, 17, 26, 30, 31, 37 and 42 of Section III of this Order.

24. An appraisal proceeding is pending in the Court of Chancery of the State of Delaware, New Castle County, in the consolidated action entitled E. F. Gibbons, et al. v. Schenley Industries, Inc. The appraiser appointed by the Court to determine the value of the Schenley shares for the purpose of the June 17, 1971 merger concluded that each share of Common Stock of Schenley Industries had a value of $43.87 and the value of each share of $1.40 Preferred Stock was $39.84. The Petitioners and Respondents in that action have appealed from the conclusions of the appraiser.

25. Each share of Schenley Common and $1.40 Preferred had a per share fair value respectively of not less than $48.00 and $43.20 at June 17, 1971, rather than $29.00 and $26.10 per share as contended by defendants.

DEFENDANTS' STATEMENT OF DISPUTED FACTS

A. The following constitutes defendants' statement of disputed facts. This statement will not include defendants' legal conclusions or contentions -- which are outlined in Part IV herein and will be fully set forth in defendants' pretrial memorandum -- but only those matters which may be the subject of the presentation of evidence at trial.

When a paragraph is marked with an *, defendants believe that there will be no evidence presented to contradict such paragraphs but, at the present time, such matters cannot be treated as undisputed facts.

* 1. The audited balance sheets of Schenley as of August 31, 1968, December 31, 1968, December 31, 1969 and December 31, 1970 correctly show Schenley's cash as of those dates.

* 2. The audited balance sheets of Schenley as of August 31, 1968, December 31, 1968, December 31, 1969 and December 31, 1970 correctly show Schenley's marketable securities as of those dates.

* 3. The audited balance sheets of Schenley as of August 31, 1968, December 31, 1968, December 31, 1969 and December 31, 1970 correctly show Schenley's accounts receivable as of those dates.

* 4. The audited balance sheets of Schenley as of August 31, 1968, December 31, 1968, December 31, 1969 and December 31, 1970 correctly show Schenley's inventory as of those dates.

* 5. The audited balance sheets of Schenley as of August 31, 1968, December 31, 1968, December 31, 1969 and

December 31, 1970 correctly show Schenley's long-term and short-term debt as of those dates.

* 6. The audited balance sheets of Schenley as of August 31, 1968, December 31, 1968, December 31, 1969 and December 31, 1970 correctly show Schenley's net worth as of those dates.

.7. The financial statements of Schenley were fairly and accurately presented in accordance with generally accepted accounting principals.

8. The financial statements of Glen Alden were fairly and accurately presented in accordance with generally accepted accounting principals.

B. The following constitutes defendants' response to plaintiffs' Statement of Disputed Facts. Since plaintiffs' statement is, for the most part, a reiteration of their legal conclusions, we will make no comments in the nature of denials or objections on the grounds of relevancy. Any response will be either to indicate the lack of a dispute or to set forth additional facts which should be considered part of defendants' statement of disputed facts.

Plaintiffs' Paragraph No.

1. There is no dispute about the amount or nature of Schenley's assets at any of the relevant times. All of such assets are fully and adequately set forth in financial statements of Schenley. Plaintiffs seek to draw subjective conclusions about such assets which defendants dispute.

2. & 3. In addition to disputing that they "knew" of the alleged facts set forth in these paragraphs, defendants point out that the predictions made in Exhibits 5 and 6 were, quite simply, incorrect.

4. The testimony of defendant Chernow contains the accurate statements of his opinions.

5., 6., 7. & 8. There is no dispute concerning the business practices followed by Schenley's management during the periods in question. Nor is there any controversy about the effect of any or all of such activities upon Schenley's financial condition or that such effects are fully reflected in Schenley's financial statements. Defendants dispute plaintiffs' conclusion that there was any so-called "Liquidation Program" as asserted in these paragraphs.

9. Defendants dispute this conclusory paragraph and assert that the merger was, as previously held by the Chancery Court of Delaware, authorized under the laws of that state.

10. As defendants have previously testified, this conclusion is disputed.

11. Under applicable accounting rules and principals, Glen Alden carried its investment in Schenley at original cost (plus investments resulting from consolidat earnings) since no event had occurred which would so adverse affect Schenley's operations as to require either a write-of or amortization. Such accounting treatment is not affected by and is not relevant to the value of Schenley minority stoc

12. See Undisputed Fact 11. Each defendant who has testified has set forth the factors he considered in connection with the proposed merger.

13. See comments to paragraph 12. The directors of Schenley and their financial advisor were thoroughly familiar with and considered the business and financial con-

dition of Schenley at the time they considered the proposed merger.

14., 15., 16., 17. & 18. Schenley's directors, acting in part through their advisor Allen & Company, evaluated the proposed merger and changes were made in the terms for the benefit of Schenley shareholders. Allen & Company received -- and evaluated -- full and accurate information concerning Schenley.

19. The proxy statement makes a specific disclosure that a substantial portion of the proceeds of the sale of Buckingham were to be transferred to Glen Alden after the merger and also expressly states that the assumption of debt reduction was only for purposes of a pro forma presentation.

20. Defendants dispute all of the conclusions in this paragraph.* It should be noted that this paragraph contains the _only_ attacks plaintiffs have ever made on Schenley's financial statements. Thus, there is no dispute that Schenley's financial statements in 1968, 1969 and 1970 accurately set forth Schenley's cash position, receivables, inventory, marketable securities, and long and short-term debt. In addition, except for the contentions made in this paragraph, there can be no dispute that Schenley's income for the periods was accurately presented.

21. This contention is disputed.

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* Only subparts (b) and (d) even refer to audited financial statements.

22. There is no dispute about the figures presented in this paragraph as of the specific dates indic ted as all are found in Schenley's financial statements. Only plaintiffs' conclusion is in dispute.

23. Of course, this paragraph is purely conclu sory and is disputed. Defendants contend all required disclosures were appropriately made.

24. The decision of the appraiser is a matter of record and its legal effect or relevancy in this procee ing is sharply disputed.

25. Naturally defendants disagree with plaintiffs' conclusions.

APPENDIX A TO IV

Plaintiffs' Contentions As to LIABILITY and DAMAGES

Defendants' liability is based on:

A. Their misrepresentations of material facts and the omission of material facts in a Proxy Statement dated May 21, 1971 in violation of Section 14(a) of the Securities Exchange Act of 1934 (the "Act") and Rule 14a-9 of the SEC;

B. Their failure to make the required disclosure between August 1968 and June 17, 1971 of the business and financial condition of Schenley and their engaging in acts, practices and a course of conduct which violated Section 10(b) of the Act and Rule 10b-5 thereunder of the SEC;

C. Their violation of their fiduciary obligations to deal fairly and openly with the holders of Schenley $1.40 Preferred and common stock other than Glen Alden (the "Minority Stockholders") in fixing the terms of the June 17, 1971 reorganization of Schenley.

Subsections A and B set forth the facts upon which plaintiffs contend the defendants are liable to the plaintiffs under Sections 14(a) and 10(b) of the Act. The plaintiff class, as defined by Judge Weinfeld's decision of May 1973, consists of all Minority Stockholders as of February 24, 1971, the day before the announcement of the reorganization. Those members of the class who were stockholders as of May 10, 1971, the record date, assert their federal claims under both Section 14(a) and Section 10(b) of the Act; whereas those members of the class who sold their shares after February 24, 1971 and prior to May 10, 1971 make their federal claim only on the basis of Section 10(b).

Following subsection B is a discussion of culpability, materiality and causation, which are elements of the lawsuit under both Sections 14(a) and 10(b).

Subsection C then discusses elements of a common law action as well as the facts upon which that action is based.

A. THE PROXY STATEMENT MISREPRESENTED AND OMITTED TO STATE MATERIAL FACTS RELATING TO THE VALUE OF THE SCHENLEY SHARES

1. <u>The Proxy Statement gave an untrue and misleading description of the amount and source of the funds that Schenley would transfer to Glen Alden in connection with the reorganization.</u>

In order to conceal the amount of Schenley's liquid assets that would be transferred to Glen Alden, the Proxy Statement disclosed only that the proposed reorganization "will permit Glen Alden to transfer funds from Schenley to itself including a substantial part of the proceeds from the recent sale of Schenley's subsidiary . . . Buckingham, subject only to applicable restrictions in Schenley's various loan agreements." It was stated that "these funds . . . will provide a source for payment of current maturities of Glen Alden long term debt" of $47,000,000.

However, the actual dollar amounts of such "substantial funds" and "restrictions" were known to defendants and should have been stated, and the following material facts also were not disclosed in the Proxy Statement:

(a) When the reorganization became effective on June 17, 1971, Schenley would supply from its funds $16,934,000 in cash and would pay not $47,000,000, as indicated in the Proxy Statement, but $81,285,000 to Glen Alden to purchase the $101,600,000 principal amount of Glen Alden Debentures. In the reorganization, the

cash and Debentures were the sole consideration to be given in exchange for the minority held Schenley shares.

(b) Before the reorganization became effective, at Schenley's request the restrictions in the loan agreements were amended to increase from $79,910,000 at December 31, 1970, to $115,000,000 the amount that Schenley would be permitted to pay for the acquisition of its capital stock in connection with the reorganization.

(c) Before its 1968 investment of $404,975,000 in 6,887,089 Schenley common shares, or $58.65 per share, Richard Graham, an officer of defendant Rapid-American Corporation, the parent of Glen Alden, and Bear Stearns & Co., Glen Alden's then financial adviser, were of the opinion that three categories of assets of Schenley were held in amounts in excess of requirements for the operation of its business and could be reduced and liquidated into cash or its equivalent as follows:

Category	Amount to be Realized in $		
	Bear Stearns & Co.		Graham
Inventory of whiskeys and wines	120,000,000	--	130,000,000
Accounts Receivable	20,000,000	--	30,000,000
Proceeds of proposed sale in 1967 of 52% interest in Buckingham, net of taxes		--	45,000,000
Marketable Securities	30,000,000	--	-0-
TOTAL	170,000,000		205,000,000

The reasonableness of the price paid by Glen Alden to acquire the Schenley shares in 1968 was established by these excess assets and the $170,000,000 to $205,000,000 realizable upon their reduction to required levels.

(d) Bulk whiskeys had been produced by Schenley's prior management in substantially greater quantities than was needed to meet current and anticipated sales. As a result, its 1967 inventories were, in the opinion of Glen Alden's management, between $120,000,000 and $130,000,000 more than needed to meet its current and anticipated needs. When Glen Alden took over the management of Schenley in 1968, a Liquidation Program was immediately instituted to convert into cash the 1967 excess bulk whiskey inventory and other marginally profitable inventory items and assets. Trade accounts receivable of $135,300,000 were to be reduced immediately by $20,000,000 to $30,000,000 by requiring prompt payment of outstanding accounts, the return of previously shipped goods and by limiting future shipments to current needs of wholesalers. The marketable securities of $30,000,000 which were owned at the end of 1967 by Schenley's 52% owned subsidiary, the Buckingham Corporation, were not needed to operate the latter's business. By June 1969, those securities had increased to about $32,000,000 but could not be transferred to Schenley so long as the 48% minority interest was outstanding.

(e) It was expected that the liquidation of the excess inventory and trade receivables could be accomplished within four to seven years. The stated purpose of the Liquidation Program was to create a fund or "bank" of $170,000,000 to $205,000,000 for exclusive use by and for the benefit of Glen Alden to reduce the latter's debts and scale down Schenley's debt.

(f) The fund of $205,000,000 and more was to be realized sooner than expected. At the end of 1969, through a reorganization by which Schenley exchanged its $1.40 Preferred shares for the 48% minority interest in Buckingham, the latter paid the $32,000,000 to Schenley. By December 31, 1970, Schenley had reduced its trade accounts receivable by $19,300,000. In October and November 1970, Schenley had committed the sale of its marginally profitable wine business for about $14,000,000 and the sale of Buckingham for $120,000,000. By December 31, 1970, Schenley had reduced its 1967 excess bulk whiskey inventories by $72,100,000. Except for the sale of Buckingham and the wine business, the foregoing was not disclosed in the Proxy Statement.

Before February 24, 1971, when Glen Alden announced the proposed reorganization, defendants knew that by the end of May 1971 Schenley would have cash and marketable securities of approximately $191,000,000 (rather than $162,000,000 as indicated in the Proxy Statement), an increase of $166,700,000 over the $24,392,000

in such assets that Schenley had on hand on January 1, 1968, excluding Buckingham. By the end of May 1971, Schenley would owe credit institutions $191,600,000, $48,700,000 less than was owed at the end of 1967. The Proxy Statement did not mention this $215,000,000 overall improvement since 1968 in Schenley's financial condition which was due in the main to the results of the Liquidation Program and the sale of Buckingham. The Proxy Statement did not disclose that at least $140,000,000 represented excess liquid assets that were not required for the operation of Schenley's business.

The Proxy Statement did not disclose that on January 27, 1971, the management of Glen Alden had certified to one of its creditors, John Hancock Mutual Life Insurance Company ("Hancock"), that Glen Alden was not in a position to pay at least $22,997,000 of its debts that was due on February 1, 1971, and that the earliest such debts could be paid was August 1, 1971. As a result, the interest rate on the $35,000,000 loan from Hancock was increased by one-half of one percent. In January 1971, payment of an additional $20.000,000 due banks on February 1, 1971 was extended to August 1, 1971, which was disclosed in the Proxy Statement.

By not revealing the foregoing facts prior to and in connection with the proposed reorganization, defendants avoided the risk of disclosing information that might encourage holders of the $1.40 Preferred shares to exercise their right to convert their Preferred shares into Schenley common stock. Such conversion was likely to cause Glen Alden's ownership of 86% of the common shares to be diluted to below 80% and could have diluted it to as low as 67% if all the $1.40 Preferred shares were converted. In such event, not only wou[illegible] Glen Alden's share of the Schenley excess liquid assets be reduced but Glen Alden would lose its right to include Schenley in its federal consolidated income tax return, a substantial source of cash for Glen Alden. Under the tax agreement between Glen Alden and Schenley relating to such returns, Schenley paid the full amount of its federal tax liabilities to Glen Alden computed on a separate return basis, a substantially greater amount than Glen Alden's consolidated income tax liability.

The Proxy Statement failed to disclose that the proposed reorganization would confer no economic benefit of any kind upon Schenley and would not serve any need or plausible business purpose of Schenley. By resorting to the defective disclosure herein set forth, defendants concealed the true purpose of the reorganization which was to deprive the minority shareholders of the fair value of their share of Schenley's surplus assets.

2. <u>The Proxy Statement failed to disclose that Schenley had on hand not less than $115,000,000 and as much as $140,000,000 of liquid assets that were not needed to operate its business.</u>

(a) Giving effect to the Liquidation Program and the sale of Buckingham, it is undisputed that by the end of May 1971, Schenley would have on hand about $191,000,000 of cash and marketable securities, of which a minimum of $115,000,000 and a maximum of $140,000,000 were not needed to operate its business. While defendants will contend that no part of such a large block of cash and near cash assets was in excess of the amount required to operate Schenley's business, the fact remains that when the merger became effective on June 18, 1971, Glen Alden caused Schenley to pay out $98,000,000 in cash in order to consummate the "reorganization", after obtaining the required consent of Schenley's institutional lenders to the payment of as much as $115,000,000 for the same purpose, an action that could not have been taken and a consent that would not be forthcoming if it was not apparent that these were excess funds. The plaintiffs contend that based on Schenley's requirements and the size of its remaining liquid assets, an additional $25,000,000 or more of Schenley's cash and near cash was not needed for the operation of its business and was available for withdrawal

or reinvestment by Schenley. As proof of this it should be noted that in 1968 and 1969 and in earlier years, Schenley, operating independently of Buckingham, conducted and expanded its business with balances of no more than about $21,000,000 in cash and marketable securities, a fact also not disclosed in the Proxy Statement.

(b) It appears that for the purpose of the 1971 reorganization, defendants determined the value of the Schenley Common and $1.40 Preferred at $29.00 and $26.10, respectively, by the market prices of Schenley's Common shares and by arbitrarily deciding, according to defendant Riklis, that the $1.40 Preferred shares, having been issued in the December 1969 reorganization to the minority holders of Buckingham Common stock, should be valued at about $26.00, which would approximate their worth had Buckingham been sold to Northwest Industries in 1969 rather than in 1970. Defendants attributed no additional value to Schenley's surplus cash and marketable securities which amounted to $14.00 or more per share, assuming full conversion of the $1.40 Preferred. Defendants thus deprived the plaintiff class of $14.00 of the per share fair value of their shares merely by concealing the facts relating to the existence and size of Schenley's excess current assets.

3. The Proxy Statement contained financial statements that understated Schenley's past income.

(a) The Proxy Statement (p. 43) stated that an estimated $13,100,000 of income tax was payable on the 1971 gain from the sale of Buckingham Corporation, whereas defendants knew that the estimated income tax would amount to about $4,100,000 by reason of write-downs which were then known to be available and permissible at year end 1971 on the following items of inventory:

(i) At December 31, 1970, empty used barrels were carried on Schenley's financial statements at about $10.00 per barrel for a total of $16,495,000. Their resale value had declined at December 31, 1970 by at least 50% of such stated book value.

(ii) At December 31, 1970, 264,600 barrels of light whiskey, which had been redistilled from corn and Tennesee whiskey between 1968 and 1970, were carried on Schenley's financial statements at a stated book cost of $18,271,500. Such cost reflected the original cost to Schenley of the corn whiskey and resulted in a cost for the light whiskey that was approximately 50% more than what it would have cost Schenley to produce light whiskey by original distillation.

(iii) Corn whiskey and Tennesee whiskey, redistilled for use as neutral grain spirits, were carried on Schenley's books at costs which ranged from 43¢ to 92¢ per gallon when the cost of original distillation of such spirits was about 35¢.

(iv) Discontinued bottling supplies were written down by $1,000,000.

(b) The earnings of Schenley before taxes were understated in the annual reports for the years 1969-71 and at page 22 of the Proxy Statement by the following undisclosed non-recurring excess costs that resulted from using higher cost redistilled neutral grain spirits.

Year Ended December 31, 1969

Usage 5,753,000 OPG at per record cost	$3,986,000
at normal cost of $.35	2,013,000
Excess Cost	$1,973,000

Year Ended December 31, 1970

Usage 6,886,000 OPG at per record cost of $.9546	$6,574,000
at normal cost of $.35	2,410,100
1970 Excess Cost	$4,163,900

Year Ended December 31, 1971

Excess Cost	$3,795,000

4. <u>The pro forma financial statements were materially untrue and misleading.</u>

(a) The Proxy Statement contained a pro forma balance sheet whose stated purpose was to show the effect of the sale of Buckingham on Schenley's financial condition as if such sale had occurred on December 31, 1970, and $95,400,000 of the proceeds were retained by Schenley. The stated purpose of the pro forma income statement was to show the effect on Schenley's income for the year ended December 31, 1970, if the sale had occurred on January 1, 1970, and assuming $12,500,000 of the proceeds was then used to reduce Schenley's long-term debt and $93,400,000 was used to reduce its short-term debt. It was stated that such assumption "is not intended as a representation that the proceeds of sale will be applied to reduce Schenley's short-term debt."

(b) The above quoted statement was untrue in that Schenley did not propose to reduce short-term debt with proceeds of sale and the statement was misleading because it concealed the fact that Schenley had already decided to use the proceeds to pay $81,285,000 to Glen Alden for its 7-1/2% Debentures and to advance $16,934,000 in cash without which the reorganization could not be consummated because Glen Alden itself lacked the funds necessary for that purpose. The statement also

concealed the fact that Schenley had obtained the consent of its lenders of long-term debt to use up to $115,000,000 of its funds to accomplish the reorganization.

(c) The pro forma income statement reflected a reduction in interest cost on short-term debt of $7,675,000 by reason of the above assumption. However, it was not disclosed, as required, that by March of 1971 Schenley's short-term debt had already declined by over $20,000,000, and interest rates had declined from 8.22% to about 5-1/2% with the result that absent the "assumption", Schenley's 1971 interest cost in any event would be at least $4,000,000 less than it was in 1970.

(d) In connection with the pro forma income statement, it was not disclosed, as required, that instead of using the $98,000,000 for the reorganization, had Schenley invested in the 9-1/2% Notes of Northwest Industries, Inc., it accepted or guaranteed in connection with the sale of Buckingham to Northwest, or in comparable securities, its interest income would have been higher by at least $1,100,000. Under any circumstance, it was known by May of 1971 and not disclosed that in 1971 Schenley's interest income would be at least $1,100,000 greater than in 1970, due to the expanding amount of its excess liquid assets and their greater utilization for income bearing investment in 1971.

(e) The pro forma income statement also failed to disclose, as required, the non-recurring excess cost in 1970 of neutral grain spirits that was reflected in that statement. See ¶3(b) above.

The failure to make these adjustments (or even to disclose their existence) had the effect of understating the pro forma income by over $9,000,000 before taxes and $4,700,000 after taxes. Had those adjustments been made, Schenley's total income would have been $27,200,000 or $3.01 per share, primary earnings, or $2.64 per share, fully diluted, instead of $2.42 and $2.18, respectively, as shown on pages 43 and 15 of the Proxy Statement.

5. The Proxy Statement did not fairly or adequately disclose that the management of Glen Alden, who fixed the terms of the proposed reorganization, was of the opinion on May 21, 1971 that $62.72 per share was at least the value of Glen Alden's investment in 86% of the outstanding Schenley Common shares at December 30, 1970. Glen Alden reflected the value of its investment in Schenley Common shares at their August 31, 1968 acquisition cost of $58.65 per share, of which $38.95 represented the August 31, 1968 net asset value of the Schenley Common shares and $19.70 per share represented the excess of Glen Alden's cost over net asset value. At

December 31, 1970, the net asset value of the shares had increased to $43.02 per share and the excess cost of $19.70 per share remained the same. It was the opinion of Glen Alden's management expressed to their public accountants and auditors that prior to June 17, 1971 (as well as thereafter) the Schenley Common shares had not declined in value since acquisition in 1968 and for that reason Glen Alden had not amortized the excess costs attributable to the investment.

6. In stating that it was the opinion of Allen & Company Incorporated ("Allen Opinion") that the terms of the proposed reorganization were "fair and equitable", the Proxy Statement was untrue and misleadingly incomplete by failing to disclose:

(a) The Allen Opinion did not consider the existence or amount of Schenley's excess current assets as set forth in paragraphs 1 and 2 above.

(b) The Allen Opinion did not consider the understatements in income and in the pro forma income of Schenley as set forth in paragraphs 3 and 4 above.

(c) The Allen Opinion was based in part on the mistaken belief that "60% of Schenley's total

inventory consisted of bourbons and bulk whiskey for use in blended whiskey" (Allen Opinion, p. 25), whereas in fact, as the defendants knew, the smallest part of Schenley's inventory consisted of bourbons and bulk whiskey for such use.

(d) Contrary to the conclusions stated at page 15 of the Allen Opinion, the Schenley overhead reduction program was not responsible for higher profits in 1970 and the largest part of the decrease in Schenley's 1968 earnings was due to non-recurring transitional costs.

(e) The Allen Opinion did not consider or give weight to the fact that Glen Alden's management was of the opinion that no decline had occurred in the value of its investment in Schenley as set forth in paragraph 5 above.

(f) The Allen Opinion that the terms were fair and equitable was based primarily on the market prices of the Schenley shares for the fifteen months preceding February 24, 1971, during which period of time the facts stated in (a), (b) and (e) above were not disclosed to the market place and were not reflected in the quoted market prices.

7. <u>The Proxy Statement failed to disclose the rating and market prices of other Glen Alden Debentures</u>.

While the 1971 Proxy Statement, at page 5, stated,

"It is expected that the fair market value of the Debentures [the 7-1/2% Glen Alden Debentures into which the shares of Schenley preferred and common are to be converted under the merger] on the effective date of the proposed reorganization [the merger] will be less than their face amount",

the Proxy Statement failed to disclose the following material facts relating to the value of the Glen Alden 7-1/2% Debentures that were to be exchanged for Schenley shares in the proposed reorganization:

(a) There was outstanding $357,300,000 principal amount of 6% Glen Alden Debentures whose quoted market price on the New York Stock Exchange ranged from 62-1/4 to 53-1/4 per $100 face amount between January 1, 1971 and May 21, 1971. On May 20, 1971, the closing price was 57-1/2.

(b) The 6% Debentures were rated "B" in investment quality by Moody's Financial Service. Bonds rated "B" are those

"which . . . lack characteristics of the desirable investment. Assurance of interest and principal payments or of maintenance of other terms of the contract over any long period of time may be small." (Moody's Industrial Manual, 1970, pp. v, vi)

8. <u>The Proxy Statement failed to disclose the basis upon which the Schenley minority were evaluated. Had such disclosure been made, the unfairness of the merger terms would have become apparent</u>.

(a) It is undisputed that in the reorganization, Glen Alden based the value of the Schenley shares on recent market prices and the desire to give the holders of the $1.40 Preferred shares the equivalent of about $26.00 per share, which represented the per share value of the Buckingham common stock, assuming the shares were sold for $152,000,000 in 1969. (Undisputed Fact #13) The Proxy Statement failed to disclose the foregoing basis of evaluation. The Proxy Statement also failed to disclose that Glen Alden and the directors of Schenley, in determining the fairness of the terms of the merger, ignored the large amount of Schenley's excess cash and liquid assets, its past and future earnings and book value. The Proxy Statement also failed to disclose that a Delaware court, in determining the fair value of the Schenley shares in an appraisal proceeding, or a state or federal court, in granting relief from an unfair merger, would consider and weigh these important criteria of value.

(b) In any case, market prices would be entitled to little or no weight where, as here, important factors bearing on the value of the Schenley shares were concealed

from the market place and the readers of the Proxy Statement, i.e., (i) the source and large amount of Schenley's excess cash and marketable securities; (ii) Schenley's earnings and pro forma earnings which exceeded those shown in the Proxy Statement; and (iii) the opinion of Glen Alden's management that its investment of about $62.00 per share in Schenley common stock had not declined in value since acquisition. The combined weight of those other factors would give the Schenley Common and $1.40 Preferred shares a value substantially in excess of the $29.00 and $26.10 price that defendants attributed to those shares by their erroneous method of evaluation.

(c) Furthermore, as defendants' experts previously admitted (and as is the fact), the $1.40 Preferred, being convertible into 9/10 of a share of common at the option of the holder, was worth 9/10 of the value of the common rather than $26.00, as determined by defendants' improper method of valuation.

(d) The Proxy Statement gives the false impression that negotiations with respect to the reorganization had actually taken place between the directors of Schenley and Glen Alden. The Proxy Statement fails to disclose the undisputed facts (#6-10) that (i) the directors of Schenley had no knowledge prior to February 24, 1971 that a merger proposal would be forthcoming from Glen Alden;

(ii) the directors of Schenley had made no investigation or study of the feasibility or fairness of the proposed reorganization prior to or after February 24, 1971; and (iii) that no negotiations as to the terms of the reorganization had taken place between Schenley and Glen Alden prior to or after February 24, 1971.

(e) The Proxy Statement also failed to disclose that on February 24, 1971, without prior discussion between the other directors of Glen Alden and before any studies were made of the proposed merger, defendants Riklis and Becker fixed the terms of the merger, which were approved by members of the Executive Committee of Glen Alden on the same day. Four directors, of which three were defendants Riklis, Becker and Johnston, were members of the Committee.

( ) .

B. THE DEFENDANTS FAILED TO MAKE THE REQUIRED DISCLOSURE BETWEEN AUGUST 1968 AND JUNE 17, 1971 OF THE BUSINESS AND FINANCIAL CONDITION OF SCHENLEY AND ENGAGED IN ACTS, PRACTICES AND A COURSE OF CONDUCT IN RESPECT TO SCHENLEY WHICH VIOLATED SECTION 10(b) and RULE 10b-5

Introduction

The defendants violated Section 10(b) of the Act in six related, but distinct ways. Before presenting the six distinct violations, this section sets forth in chronological order the facts common to the Section 10(b) violations.

A. In March 1968, Glen Alden purchased 18% of the common stock of Schenley from Lewis Rosensteil and related sellers. The Glen Alden-Rosensteil purchase agreement required Glen Alden to make a tender offer to all other Schenley common stockholders on terms at least as favorable as those obtained by Rosensteil. In August 1968, Glen Alden made a tender offer which holders of all but 12% of the then outstanding Schenley common stock accepted.

B. Glen Alden acquired 88% of the Schenley common stock between March and August 1968 at an average price of $58.65 per share; before entering negotiations with Rosensteil, the prevailing market price for Schenley common was $30 per share.

C. Prior to committing itself to pay almost double the market price for the Schenley common stock, Glen Alden satisfied itself that it was not paying an excessive price for Schenley. By March 1968, Glen Alden knew that Schenley had excess assets which could be converted into $205,000,000 in

cash. Glen Alden concluded that Schenley's $205,000,000 in excess cash could be used as its own private bank. (See Graham Report, Exhibit # 5).

D. In April 1968, Glen Alden had to demonstrate in a law suit that it had not paid an excessive price for the Schenley common stock. As proof of that fact, Glen Alden filed an affidavit of its financial adviser, Bear, Stearns & Co., which stated that Schenley's excess assets could be converted into $170,000,000 in cash, which Schenley did not need for the operation of its business. Glen Alden, according to Bear, Stearns, could use this cash to reduce the effective cost which it paid for the Schenley shares. (See Bear, Stearns Report Ex. #6)

E. The Graham and Bear, Stearn's Reports stated that the excess assets consisted principally of bulk whiskey inventories and trade accounts receivable of Schenley and marketable securities owned by Buckingham, a 52% owned subsidiary of Schenley. Buckingham had marketable securities of over $30,000,000 which were not needed for the operation of its business. It was estimated in those Reports that it would take four to seven years to liquidate the excess inventories and trade accounts receivable.

F. Glen Alden could not use the excess cash for its own exclusive benefit as long as any part of the Schenley common stock or that of Buckingham remained in the public's hands. Two steps had to precede the transfer of Schenley's excess cash to Glen Alden: the elimination of the public holders of 48% of the common stock of Buckingham; and the elimination of the public holders of 12% of the common stock of Schenley.

G. Schenley eliminated the Buckingham minority on December 15, 1969. Immediately after the reorganization became effective, Buckingham promptly transferred its $32,000,000 in excess marketable securities to Schenley. The Buckingham minority received Schenley's $1.40 Preferred which was convertible into 9/10 of a share of Schenley common.

H. On February 24, 1971, Glen Alden decided to eliminate Schenley's Minority Stockholders and put itself in a position to transfer Schenley's excess cash to itself. The Minority Stockholders, consisting of the holders of 12% of the Schenley common stock who had rejected the tender offer in 196[illegible] and the holders of Schenley $1.40 Preferred, the former Buckingham minority, were to receive a Glen Alden debenture and cash equal to the value of their shares. That value was determined on the basis of the prevailing market price of Schenley's common stock, which had dropped from $58 per share in August 1968 to $29 per share by February 24, 1971.

I. The $205,000,000 of excess cash was to be realized sooner than the Graham and Bear, Stearn Reports had estimated. By the end of December, 1969, Schenley had secured Buckingham's $32,000,000 in excess marketable securities. By December 31, 1970, Schenley had reduced its trade accounts receivable by $19,300,000. In October and November 1970, Schenley had committed the sale of its marginally profitable wine business for about $14,000,000 and the sale of Buckingham for $120,000,000. By December 31, 1970, Schenley had reduced its 1967 excess bulk whiskey inventories by $72,100,000.

J. By February 24, 1971, Glen Alden could see that much of Schenley's excess assets had been or would soon be converted into excess cash. Between January 1, 1968 and May 1971, Schenley's liquid financial condition showed a $215,000,000 improvement. At January 1, 1968, Schenley had $24,309,000 in cash and marketable securities; by the end of May 1971, Schenley would have $191,000,000 in cash and marketable securities, an increase of $166,700,000. As of January 1, 1968 Schenley owed credit institutions $240,300,000; by the end of May 1971, Schenley would owe $191,600,000, a decrease of $48,700,000.

K. Of the $191,000,000 in cash and marketable securities which Schenley would have on hand in May 1971, at least $140,000,000 was excess cash or near cash -- funds which Schenley did not need for the profitable operation of its business.

L. While Schenley's liquid financial condition was improving dramatically under Glen Alden's control, its market price declined from $58 per share in August 1968 to $29 per share on February 24, 1971. At August 31, 1968 and December 31, 1970, Glen Alden reflected the value of its investment in Schenley common stock at $58.65 and $62.72 per share, respectively. During the entire period prior to the merger, Glen Alden's officers and directors were of the opinion that no decline in the value of the Schenley shares had taken place since their acquisition in 1968.

M. One other factor which determined the consideration of the Minority Stockholders was a loan agreement, dated July 26, 1968, under which ten banks lent Glen Alden $50,000,000. The Loan Agreement provided that Schenley could merge with

Glen Alden, with either company being the surviving corporation. The Loan Agreement stated two important conditions to the merger. First, the consideration for the stock exchanged in the merger had to consist solely of stock and/or Glen Alden debentures, plus cash and/or rights to subscribe to stock of the continuing corporation. Second, the continuing corporation, if other than Glen Alden, had to assume the obligations of Glen Alden under the Loan Agreement.

The several distinct violations of Section 10(b) may now be stated in light of this chronological history.

1. By Deceiving the Schenley Shareholders in the August 8, 1968 Prospectus, Glen Alden Acquired Enough Shares to Force the Remaining Shareholders in 1971 to Sell Their Shares at an Unfair Price.

(a) Through the August 1968 tender offer, Glen Alden obtained enough common stock to bring its total to 88% of Schenley's voting stock. Obtaining control of this 88% was the critical factor which enabled Glen Alden to fix the terms upon which the Minority Stockholders would be eliminated.

(b) Glen Alden obtained the critical control of Schenley only deceiving the Schenley shareholders in the August 8, 1968 Prospectus, which described the tender offer. That Prospectus failed to disclose the following facts, each of which the Schenley shareholders would have considered important in deciding whether to accept Glen Alden's tender offer:

(i) Schenley had excess assets;

(ii) The Bear Stearns and Graham reports opined that those excess assets could be converted into between $170,000,000 and $205,000,000 in excess cash in four to seven years;

(iii) Once Glen Alden acquired managerial control of Schenley, Schenley would institute a Liquidation Program which would consist of:

(a) converting between $120,000,000 and $150,000,000 of its excess inventories into cash by usage of case goods, bulk sales, redistillation and curtailment of new production; and

(b) reducing its trade accounts receivable by $20,000,000 to $30,000,000 by requiring prompt payment of outstanding accounts and return of previously shipped goods and by limiting future shipments to current needs of wholesalers and distributors; and

(c) acquiring $30,000,000 in certificates of deposit and short-term securities which Buckingham did not need to conduct its business profitably.

(iv) Glen Alden had a Loan Agreement with ten banks which governed the terms upon which Schenley and Glen Alden could merge.

2. <u>By Means of a Misleading Proxy Statement Dated November 17, 1969 Glen Alden Put Itself in a Position to Force the $1.40 Preferred Shareholders to Sell Their Shares to Glen Alden at a Later Date</u>.

(a) The defendants caused Schenley and Buckingham to issue a Proxy Statement dated November 17, 1969 in which Schenley proposed to issue its $1.40 Preferred shares to holders of 48% of the outstanding shares of Buckingham. The Schenley-Buckingham merger would permit Schenley to transfer $32,000,000 of Buckingham's excess marketable securities to Schenley and would permit Glen Alden to eliminate the $1.40 Preferred shareholders along with the Schenley 12% minority common shareholders at a later date.

(b) The 1969 Proxy Statement, through which the defendants accomplished these objectives, failed to disclose:

(i) Schenley had excess assets;

(ii) The Bear, Stearns and Graham Reports opined that those assets could be converted into between $170,000,000 and $205,000,000 in excess cash in four to seven years;

(iii) Schenley had instituted a Liquidation Program in the fall of 1968 to convert its excess assets to excess cash;

(iv) The Liquidation Program had achieved successful interim results;

(v) Glen Alden had an additional Loan Agreement dated November 15, 1968, with the same ten banks, pursuant to which Glen Alden borrowed $133,000,000. This Loan Agreement contained essentially

the same conditions as the July 26, 1968 with respect to the terms upon which Schenley and Glen Alden could merge.

(c) In addition, the 1969 Proxy Statement gave the false impression on page 39 that the right of the holders of the $1.40 Preferred shares to convert their securities into 9/10 of a share of Schenley common could not be altered or eliminated without the affirmative vote of 2/3 of the holders of such shares voting as a class; the Proxy Statement failed to disclose that in a merger the rights of the $1.40 Preferred could be altered or eliminated by an affirmative vote of a majority of all of the Schenley stockholders, and that in such a merger the Minority Stockholders' position could be converted into cash and a debt security of Glen Alden or Schenley.

3. The February 25, 1971 Announcement of the Terms of the Reorganization was Defective and Misleading in that it Did Not Reveal that by the Merger Date Schenley Would Have at Least $140,000,000 in Excess Liquid Assets.

(a) By February 25, 1971, when Glen Alden announced the terms of the proposed Schenley-Glen Alden reorganization, the defendants knew that by the time the

reorganization would be consummated, Schenley would have $191,000,000 in cash and marketable securities, at least $140,000,000 of which was not necessary for the profitable operation of Schenley's business.

(b) The defendants also knew that in determining the value of Schenley's minority shares, they gave little or no weight to Schenley's $140,000,000 or more of excess cash and near cash assets.

(c) The defendants also knew that Glen Alden needed and would use $81,285,000 of Schenley's excess cash to pay Glen Alden's over-due loans from banks and lending institutions and that Schenley would advance the $16,934,000 of additional cash required to effectuate the proposed merger.

(d) The defendants also knew that as of December 31, 1970, Glen Alden had carried its Schenley common stock at $62.70 per share and that Glen Alden's officers and directors were of the opinion that no decline in the value of the Schenley shares had taken place since their acquisition in 1968.

(e) In making the February 25, 1971 announcement, the defendants did not disclose any of the facts set forth in the four preceding subparagraphs.

(f) It was reasonably foreseeable to the defendants that, after the announcement of the merger, a number of minority shareholders would sell their shares in the open market, as was in fact the case.

4. <u>By Misrepresenting and Omitting to State in the Proxy Statement Material Facts Relating to the Value of the Schenley Shares, the Defendants Continued Their Illegal Scheme and Course of Conduct in Violation of Section 10(b)</u>.

See discussion under Section A above relating to deficiencies in the Proxy Statement.

5. <u>The Defendants Manipulated and Depressed the Market Price of the Schenley Common Stock From 1968 Through June 17, 1971 in Order to Enable Glen Alden to Purchase the Minority Shares at an Unfair Price</u>.

(a) While the market price of the Schenley common shares was decreasing from $58 in August 1968 to $29 on February 24, 1971, Schenley's liquid financial condition showed a $215,000,000 improvement between January 1, 1968 and May 1971.

(b) At no time between August 1968 to February 24, 1971, either in the August 8, 1968 Prospectus, the November 17, 1969 Proxy Statement, the 1968-1970 year-end financials or in any press release did the defendants disclose (i) the existence of the excess assets; (ii) the amount of the excess assets; (iii) the existence of the Liquidation Program; or (iv) the interim results of the Liquidation Program.

(c) In addition, the defendants caused Schenley to understate its before-tax earnings in Schenley's annual financial statements which Schenley issued to the public for 1969 and 1970 by failing to disclose the following non-recurring excess costs that resulted from using higher cost redistilled neutral grain spirits:

Year ended December 31, 1969

Usage 5,753,000 OPG at	
per record cost.	$3,986,000
at normal cost of $.35	2,013,000
Excess Cost	$1,973,000

Year ended December 31, 1970

Usage 6,886,000 OPG at	
per record cost of $.2546.	$6,574,000
at normal cost of $.35	2,410,900
	$4,163,100

(d) Once the terms of the reorganization were announced on February 25, 1971, the market price of Schenley common stock would not, for all practical purposes, rise above $29 per common share, the value of the cash and debentures which the shareholders would be forced to accept in the June reorganization.

(e) Only after the February 25, 1971 announcement, did the defendants begin to reveal what had been occurring since 1968. On March 23, 1971, defendant Riklis stated to the financial world in Forbes Magazine:

> "When we started out, Schenley was $160 million into the banks and had $30 million in cash. Three years later, Schenley has got maybe $80 million in cash, and it's into the banks for $100 million. That's a $60-million reduction in the line, and a $50-million increase in the cash already. With the sale of Schenley's Buckingham subsidiary [under a Federal Trade Commission order], it'll be a $230-million difference. Next year, without Buckingham, Schenley will make as much as it made with Buckingham three years ago, and I'll be sitting with $200 million in cash. That's what I saw in Schenley -- the great possibility of its being a hugh cash generator, generating more cash than I put into it."

6. <u>The Defendants' Practices Which are Described in the Introduction and Five Preceding Paragraphs of this Section, Taken as a Whole, Constituted an Illegal Scheme or Course of Business to Defraud the Minority Stockholders</u>.

Culpability

Under Section 14(a) of the Act, the liability of defendants Schenley, Glen Alden and Rapid for the misrepresentations and omissions found in the Proxy Statement is virtually absolute. Scienter, evil motive or reckless disregard of the facts need not be established in order to establish liability. The liability of the other individual defendant directors of Schenley and Glen Alden would turn on whether they knew or should have known of the defects in the Proxy Statement.

With respect to Section 10(b) of the Act, liability of the corporate defendants, Glen Alden and Schenley, would be predicated on whether their agents knew or should have known of the defective disclosure or the illegal practices. The liability of each individual defendant would depend upon whether he personally knew or should have known of the defective disclosure or illegal practices.

Materiality of Defects in Disclosure

Under Section 14(a) of the Act, the standard for determining the materiality of a misrepresentation or an omission in a proxy statement is whether a reasonable man would attach importance to the facts misrepresented or omitted in determining whether to vote for or against the reorganization; whether to accept or reject what was to be given in exchange for his shares; or whether to resort to the statutory remedy of appraisal that was available to him. Here, there is more

than a substantial liklihood that full and fair disclosure would have led a Schenley stockholder to the conclusion that the terms of the reorganization were not fair nor equitable, and that the Schenley shares were worth almost twice as much as the consideration of dubious value that was to be given in exchange for them. Under those circumstances, a stockholder could have taken steps other than voting in favor of the reorganization or accepting the consideration to be given in exchange for his shares.

Each of the misrepresentations in the Proxy Statement related to the concealment of material facts that were essential to a shareholder's determination of whether the monetary terms of the proposed reorganization were fair and equitable: Was the fair value of his shares the approximate equivalent of the consideration he was forced to accept in exchange for his shares?

The concealment of the existence and size of Schenley's excess liquid assets had the effect of understating the value of the Schenley shares by $11 to $14, or more, per share. The failure to disclose the nonrecurring distillation costs and the lower interest rates had the effect of understating Schenley's earnings from continuing operations by at least $.48 per share. Those concealed earnings, when capitalized by the lower price earnings multiplier of 13, as used by Allen & Company, Inc., Schenley's financial adviser, or by 16, as plaintiffs contend,

had the effect of understating the fair value of Schenley shares by an additional $6.24 to $7.68 per share. The non-disclosure of Glen Alden's opinion that their 1968 investment in Schenley common shares had not declined in value since acquisition, and that the shares consequently had a value of approximately $19 more than was to be given in exchange for them also operated to conceal the fair value of the Schenley shares.

Also concealed were the material facts bearing on the value of the Glen Alden debentures to be given in exchange for the Schenley shares. The fact that other Glen Alden debentures were rated "B", i.e., lacked the "characteristics of the desirable investment" where the assurance of payment of interest and principal "may be small" and had been selling at discounts of 38% to 47%, had a decided bearing on their value.

The standard of materiality under Section 10(b) is similar to the one under Section 14(a) -- namely, whether a reasonable investor would consider the undisclosed facts important in making a decision whether or not to sell his Schenley shares. What the defendants concealed -- the existence and amount of Schenley's excess assets, the existence and results of the Liquidation Program and Schenley's accurate earnings -- would be considered important to a reasonable person in making an investment decision whether to sell or keep his Schenley shares.

Causation

It is well established in this Circuit that the fact that Glen Alden owned sufficient voting power to consummate the reorganization does not deprive the Minority Stockholders of their right to obtain relief by way of damages under Section 14(a) for failure to disclose in a proxy statement material facts relating to the higher value of the Schenley shares.

Under Section 10(b), the defendants' illegal scheme and course of conduct, which included a failure to make the required disclosure of material facts, played a substantial part in depressing the market prices of the Schenley common shares. By such non-disclosure the defendants accomplished an essential link in their plan to acquire the Common and $1.40 Preferred shares held by the Schenley Minority Stockholders at $29.00 and $26.10 per share, respectively, an amount substantially less than their fair value. According to the testimony of certain defendants and the affidavits of their financial experts, the then prevailing market prices of about $29 and $26 per share for those shares determined the amount of the consideration to be given in exchange for Schenley shares in the reorganization.

As to the purchaser-seller requirement under Section 10(b), the defendants knew or should have known that, as a result of the February 25, 1971 announcement of the proposed reorganization, all Minority Stockholders

would eventually become sellers of their securities, either to Glen Alden as part of the reorganization or on the open market because Glen Alden's voting power was sufficient to accomplish the reorganization. In any event, the merger would make Glen Alden or Schenley the purchaser of all of the Schenley shares that were outstanding on February 24, 1971.

C. THE DEFENDANTS BREACHED THE FIDUCIARY DUTY WHICH THEY OWED TO THE MINORITY STOCKHOLDERS UNDER THE DELAWARE STATUTORY AND COMMON LAW

1. <u>The Reorganization Served No Business Need or Purpose of Schenley and Conferred No Economic Benefit Upon Schenley and for that Reason Was Not Authorized by the Provisions of Delaware Statutory Laws Governing Corporate Mergers</u>.

Pursuant to the proposed merger, Schenley was to merge with Glen Alden's newly-formed, wholly-owned subsidiary that was organized solely for such purpose and, thereupon, Glen Alden would become the owner of all outstanding equity securities of Schenley, except the Cumulative Preferred Preference Stock, which would remain unaffected by the merger. The reorganization made no change in the business or affairs of Schenley; nor did it result in Schenley acquiring any new business or assets. Prior to and after the reorganization, Schenley and Glen Alden had not engaged in any similar business activities. Schenley realized no economies in business operations from the reorganization. The reorganization served no need or plausible business purpose of Schenley and was not authorized by the laws of Delaware.

The true purpose of the reorganization was to deprive the Minority Stockholders of their fair portion of the value of Schenley's excess liquid assets and its earnings.

2. The Terms of the Reorganization Were So Grossly Inadequate and Detrimental to the Members of the Class as to Constitute a Clear Abuse of Fiduciary Duty by Glen Alden and the Directors of Schenley to Deal Fairly and Openly.

It is beyond dispute that Schenley's directors, Glen Alden and Rapid as controlling stockholders of Schenley, had a fiduciary duty to deal fairly and openly with the Minority Stockholders in the reorganization. The discussion under the Section entitled "DAMAGES", which follows, shows that the terms of the reorganization were unfair; and the discussion above under the Section entitled "Liability - Proxy Statement" shows that the defendants did not inform the "Minority Stockholders" of the required material facts bearing on the fairness of the reorganization.

V DAMAGES

The members of the plaintiff class are in the position of defrauded sellers of securities who, after the announcement of the terms of the reorganization, were either misled or forced into selling their shares on the open market, or into accepting the inadequate consideration under the terms of the reorganization. They are entitled to be put in substantially the same position they would have been in absent the misrepresentations. Restoring the class to their former position as Minority Stockholders of Schenley is not in the best interests of the class. As sellers of securities, members of the class are entitled to damages that are the monetary equivalent of rescission, i.e., cash equal to the fair value of their shares.

Plaintiffs contend the fair value of their shares is not to be determined, as defendants contend, by the market prices that prevailed within the fifteen-month period prior to the February 25, 1971 announcement of the reorganization. Those market prices are not controlling and are entitled to little or no weight in determining value. Schenley market prices, among other things, did not reflect favorable factors that were concealed from the market place, such as, the growing amount since 1969 of Schenley's excess cash and marketable securities and, particularly, the success of Schenley's Liquidation Program, commenced in mid-1968 and continuing through 1971 and thereafter.

Properly, value is to be determined here by a consideration of all relevant factors, including, among others, the amount of excess liquid assets and Schenley's going concern value. Plaintiffs contend that, properly evaluated, the Schenley Common and $1.40 Preferred shares (which were convertible into 9/10 of a common share) had a worth of not less than $48.00 and $43.20, respectively, per share at the time the reorganization became effective, determined as follows:

> At least $14.00 per common share represented the excess cash and marketable securities which were not needed to operate Schenley's business.
>
> At least $34.00 per common share represented the going concern value of Schenley as determined by plaintiffs' financial expert, in accordance with conservative principles of appraising stocks for purposes of merger.

Glen Alden itself reflected the value of its investment in the common stock of Schenley as of December 31, 1970 at $62.72 and, in 1970, 1971 and 1972, had expressed the opinion in its financial statements that its investment in Schenley had not declined in value since it was acquired in 1968 at a cost of $58.65. In the appraisal proceeding in Delaware, the appraiser, on September 17, 1974, concluded that the value of the Schenley Common and $1.40 Preferred was $43.87 and $39.48, respectively. The appraiser's decision is being appealed by all parties.

Whether determined by Glen Alden's opinion, by the Delaware appraiser or by plaintiffs' expert, the value of

the Schenley stock was substantially above the $29 per common share package which the Minority Stockholders received in the reorganization.

Plaintiffs also contend that a class member is entitled to receive the fair value of his shares entirely in cash, rather than the $5.00 in cash and the $30.00 face amount of Glen Alden Debenture (which defendants estimate would have a market value of about $24.00), that was given in exchange for a common share and the 10% less that was given for a $1.40 Preferred share. Accordingly, each member of the class who still holds the Debentures would be entitled to cash plus pre-judgment interest upon tender of the Debentures and the interest received thereon. Those who sold the Debentures would receive cash plus pre-judgment interest less the proceeds from the sale of the Debentures and the interest received thereon to date of sale.

Because Schenley was a corporation organized in Delaware, the members of the class were entitled to the statutory right of appraisal. The material misstatements and omissions in the Proxy Statement also had the injurious effect of causing the holders of about 2,610,000 Schenley shares to forego the exercise of their statutory appraisal rights. In ignorance of such defects in disclosure, holders of approximately 705,000 shares withdrew their requests for appraisal. At a minimum, those who owned Schenley common and $1.40 Preferred shares are entitled to receive in cash $43.87 and

$39.48 per share, respectively, representing the appraised value of the shares as presently determined in the statutory appraisal proceedings currently pending in Delaware. Under Section 28 of the Act, a member of the class, whether or not he was a party to the Delaware appraisal proceeding, would be entitled to receive cash damages of the higher of the amount fixed as the value of the Schenley shares in (a) the Delaware appraisal proceedings; or (b) in this action.

APPENDIX A TO PART IV

DEFENDANTS' CONTENTIONS AS TO LIABILITY AND DAMAGES

The following is a summary statement of defendant's position regarding liability and damages. To the extent possible, this presentation will present a general review of defendant's position and will not be a detailed refutation of the many erroneous statements and conclusions presented by plaintiffs. Defendants will present their legal arguments and more protracted discussions in the appropriate place, to wit, a pretrial memorandum.

GENERAL POSITION

It is important to note the general nature of plaintiffs' claims, for the very description of them belies their validity. Plaintiffs' claims do not concern themselves with either alleged misleading statements of fact or failure to state relevant facts. There are few facts in dispute in these actions and there can be no question that the salient facts concerning the business and financial condition of Schenley are set forth in the public documents issued by defendants. Instead, plaintiffs' claims for approximately $150,000,000 in damages are premised upon the alleged failure of defendants to accept plaintiffs' subjective judgment about the value of Schenley.* As we will briefly set forth here and more thoroughly discuss in legal memoranda, the defendants disclosed all the relevant facts - including a description of the contentions of these very plaintiffs.

* For example, the major thrust of plaintiffs' case, although rephrased in many different ways, consistently returns to the question of the cash position of Schenley. Plaintiffs do not claim that this position is not described in appropriate financial statements or other public disclosures. Rather, the essence of their claim is their view that a myriad of conclusory statements should have been made about this cash position.

This disclosure and not the advocacy of plaintiffs' subjective views is what is required.

We should also point out that by plaintiffs' own definition of their case, the class they seek to represent cannot be entitled to recover damages. Plaintiffs' claim that the market price of Schenley common stock was depressed by defendant's alleged wrongful acts. If we assume that plaintiffs' claim is correct, then it is clear that most, if not all, members of the class have received the benefit of the very fraud plaintiffs allege. For example approximately 2/3rds of plaintiffs' class consist of holders of Schenley's preferred stock who were the former holders of the common stock of the Buckingham Corporation. Plaintiffs have admitted that the price of the stock of Buckingham was not manipulated, even by their theories. A review of the market prices of Buckingham and Schenley as of December, 1969 - the time these entities merged - shows that shareholders of Buckingham received the equivalent of 9/10ths of a share of Schenley stock based upon comparative market prices. If plaintiffs are correct that at that time Schenley' common stock was worth $40, or $45, or $50, whichever of the various numbers plaintiffs have advocated, then all of the holders of the Schenley preferred stock benefited since if Schenley was selling in that range, those holders would have received far fewer shares of Schenley stock. Similarly, those persons who were holders of Schenley common stock and purchased it within the 2 years preceding the merger (a substantial portion of all holders) paid, under plaintiffs' theories, far less than they should have. Plaintiffs sugges that each of these holders should now receive approximately $15 a share more for their holdings. However, under plain-

tiffs' theory, these same holders should have paid $15 a share more at the time they purchased their stock. However one looks at it, there is no claim for damages on behalf of those persons who have received the benefit of the very alleged fraud of which they now complain.

A. THE PROXY STATEMENT

Although plaintiffs purport to make separate claims based upon events occurring at different periods of time, there is obvious and patent confusion in those claims. It would appear that plaintiffs' attack on the proxy statement of May 21, 1971 incorporates by reference their charges as to what predictions and conclusions should have been made in earlier periods. We suggest that the appropriate test of the proxy statement is the quality of its disclosure at the time.

Under any standard, the proxy statement meets the requirements of appropriate disclosure. Indeed, not only does the proxy statement fulfill the legal requirements of disclosure, but it primarily emphasizes negative aspects of the merger including the conclusion of plaintiffs that Schenley was worth more than the terms offered in the merger. Taken as a whole, or by separate subjects, the proxy statement more than satisfies the requirements of the securities laws.

1. The proxy statement contains complete and accurate information concerning the business operations and financial condition of Schenley and Glen Alden. On the basis of this information, shareholders were able to evaluate the historical and present performances of both companies. In addition, a shareholder was able to review and evaluate

the assets of Schenley, determine their nature and liquidity, and compare the historical makeup of the assets. Any shareholder could review Schenley's cash position and compare it with prior years.

In addition, the proxy statement made full disclosure of the results of the sale of Buckingham and specifically compared the liquidity and asset positions of Schenley and Glen Alden both before and after the merger.

2. The proxy statement makes special disclosure of the proposed use of the funds from the sale of Buckingham. It is noted often, and prominently, that upon the consummation of the merger, a substantial portion of these funds will be transferred to Glen. Alden. These matters are set forth in conjunction with comparative information concernin Glen Alden and Schenley. No shareholder could have any doub about the effect of the merger.

3. In order to fully apprise Schenley shareholders of all relevant information, the proxy statement contains the following matters.

a. A special "warning" concerning Glen Alden's control of Schenley and that shareholders should give the merger more careful consideration than in ordinary circumstances.

b. Full information about the prior purchas of Schenley stock by Glen Alden so that shareholders could compare the merger terms with the prior offers.

c. Finally, and most important, a full

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* Interestingly, plaintiffs who speak of the changes in Schenley's cash position never mentioned the fact that the sale of Buckingham deprived Schenley of its best product.

and prominent description of all the claims made in opposition to the merger including the claims made in these actio

The sum of these disclosures is fair and complete. No shareholder could fail to be informed of all relevant facts concerning this merger, nor the outcome thereof.

Although plaintiffs make a myriad of statements and accusations about the proxy statement, it would seem that there are only a few major allegations actually directed at that document. First, plaintiffs claim that adequate disclosure was not made of the fact and the nature of cash to be transferred from Schenley to Glen Alden after completion of the merger. In fact, the proxy statement makes exactly such disclosure. Second, plaintiffs claim some unspecified error in historical reports of earnings, apparently claiming that increased cost of less than 1% of total costs should not be counted as ordinary business expenses. Plaintiffs have yet to indicate specifically in what respects they consider the Schenley financial statements improper. In fact, these costs were ordinary costs of Schenley's operation, no different than advertising, shippin or many other items. We will withhold further comment on this vague allegation until such time as plaintiffs set forth just what it is they are complaining about and reasons therefor.

Similarly, plaintiffs seem to complain that a pro forma 1970 income statement was incorrect. Having given to shareholders the actual result of Schenley's 1970 operations, page 43 of the proxy statement demonstrates a pro forma result assuming Buckingham had been sold in 1970 and the proceeds used in a specific way. It is clear that this is an assumption and not a representation and, in any event

the actual audited results for 1970 are set forth. It is difficult to fathom plaintiffs' claim since they agree with the proxy statement that these figures were only an assumption. Plaintiffs seem to claim that if the assumptions were different, the pro forma figures would be different. We agree. What relation this has to a charge of proxy fraud remains unclear.

Because of its stock ownership in Schenley, Glen Alden had the necessary voting power to cause the consummation of the merger. Although this fact does not in and of itself bar an attack on the proxy statement, it is necessary that plaintiffs make a showing of some connection between their claim and some damage to themselves.

Surely, it cannot be said that but for the proxy statement, efforts would have been made to enjoin this merger. Three efforts were made to enjoin the merger, including two by plaintiffs in this action. All were unsuccessful. A review of these applications demonstrates that they constituted a comprehensive attack on the merger and included the claims now being made by plaintiffs.

Similarly, a review of the number of shareholders who demanded their statutory appraisal right and the disclosures made to all shareholders who withdrew from such appraisal proceedings demonstrates that that legal right was fully exercised based upon more than adequate information. Anyone who considered seeking appraisal was fully apprised by the proxy statement of the claims that were being made against the merger and the contentions being made as to the value of Schenley.

B. THE 10b-5 CLAIM

Plaintiffs' so-called 10b-5 claim seems to be the general catch-all for a variety of stat[illegible]nts and alleg-

tions. The basis of plaintiffs' claim is what they define as a "liquidation program" which supposedly wrought dramatic changes in Schenley. A brief review of the relevant facts demonstrates that plaintiffs' claims are totally unfounded.*

The basic premise of plaintiffs' claim is that Schenley's cash substantially increased from 1967 to 1971. Such increase in cash did indeed occur and is demonstrated by the financial statements and public announcements of Schenley. There is no claim that the amount of Schenley's cash was hidden or not properly disclosed in its financial statements. The major elements producing this cash were the sale of Buckingham (the loss of Schenley's most profitable product) and Schenley's operating earnings. Both were fully disclosed. It is particularly noteworthy that that announcement of the sale of Buckingham had no effect on the market price of Schenley, although on the plaintiffs' theory, such a change in liquidity should have had a drastic effect.

What plaintiffs call a liquidation program is in fact nothing more than normal business operations and exercise of sound business judgment.

It is in the nature of the whiskey business that planning must be done four to ten years in advance. Naturally the composition of inventory is under constant review. It was the judgment of Schenley's management that good business planning required adjustments in the quantity, nature and age of some of Schenley's inventory. Such judgments are

* It is noteworthy that plaintiffs' allegations are devoid of any claims of improper management. Indeed, plaintiffs seem to approve of management.

considered and made continually and as part of the ordinary functions of any company in the liquor industry or any other business. For a period of time, Schenley stopped new production of whiskies of which it had an ample supply. Certain amounts of whiskies were sold in bulk and redistillation of inventory occurred. Since there was less production, less cash was expended and Schenley's liquidity was improved. This is shown in the financial statements.

The actions of Schenley's management with respect to inventories did not have a significant effect on the operations or financial condition of Schenley. Profit and loss was not affected. Bulk in bond inventories were reduced but other inventory was increased. The increase in the cash position of Schenley -- which was fully disclosed -- was insignificant as compared to the results of the sale of Buckingham or operations in general.

Of course, plaintiffs do not complain that Schenley's management failed to exercise their best business judgment in planning for the future. What plaintiffs advocate is a program of touting and self-promoting announcements We suggest that full and fair presentation of the facts, as defendants have done, is far more in accord with the securities laws.

As previously noted, plaintiffs' so-called claim of a scheme to depress the market is self-defeating as it demonstrates that most of plaintiffs' class could not have suffered damage. Nevertheless, it is worthwhile to note some of the more salient parts of plaintiffs' so-called scheme.

Plaintiffs' premise is that defendant's objective was to secure the stock of Schenley at a bargain price. They first focus on the 1968 exchange offer. Apparently,

plaintiffs' claim that defendants, as a first step in obtaining Schenley's stock at a bargain price of $29, offered all shareholders $58. Further, they seem to claim that defendants hid facts about Schenley so that more people would accept the exchange offer, in other words, so that more people would take the $58. Then plaintiffs claim that in 1969 defendants, as part of their scheme, arranged for the merger between Schenley and BHM. Apparently, plaintiffs believe that the purpose of this merger was to convince people to become stockholders of Schenley. Yet, according to plaintiffs, they would have said things about Schenley in the 1969 proxy statement to encourage even more people to become such Schenley shareholders.

But perhaps the ultimate absurdity of this position is exposed by the sale of Buckingham. According to plaintiffs, failure to disclose information about the increased liquidity of Schenley served to depress Schenley's market price, although plaintiffs are unable to specify how such was done. In October, 1970, Schenley announced the sale of Buckingham for the equivalent of $120,000,000, a sum of liquid assets far greater than all of the so-called liquidation program and all of Schenley's operating earnings had generated over a three year period. Yet, this announcement had virtually no effect on the market price of Schenley.

In summary, during the years 1968 to 1971, Schenley was managed, as any other major company, with a view to planning for the future. To the extent that management decisions had any effect of Schenley's current financial condition, full disclosure was made to the public. No possible violations of the securities laws can be said to exist.

C. THE "COMMON LAW" CLAIMS

It is apparent that plaintiffs' remaining claims have no factual predicate independent of the alleged securities laws claims. We will address ourselves to the legal insufficiency of these claims in the pretrial memorandum. However, we note that the Chancery Court of Delaware, in one of the three unsuccessful applications to enjoin this merger specifically permitted the consummation of the merger under the laws of that state. Greene v. Schenley Industries, Inc. 281 A2d 30 (Del Ch 1971).

Finally, we note that a substantial portion of plaintiffs' material is devoted to an exposition of their views of the value of Schenley. Defendants contend that such discussion is not relevant unless plaintiffs can prove a violation of the securities laws, a task which we suggest they cannot accomplish. Defendants will be prepared, as they have done to three courts previously to demonstrate the fairness of the merger to the minority shareholders of Schenley. The primary consideration in such proof will be the free and fair market price of Schenley, which, as the Court noted in Greene, is "the most significant element to be taken into consideration" since "a public judgment as to the value of Schenley appears to have been reached..."

We will further show that market value is not only the best indicator of the value of Schenley stock but also is supported by the earnings of Schenley and its financial condition including the vital fact ignored by plaintiffs that Schenley was forced to sell its best product when it disposed of Buckingham.

V Witnesses

Plaintiffs expect to call the following witnesses, not necessarily in the order listed:

Bernard Goldberg

David A. Chernow

Harold Baum

Adolph Slone

Isidore Becker

Meshulam Riklis

George T. Dormer

Joseph Gardner

Haskins & Sells by a partner or partners who supervised the auditing of Glen Alden and Schenl between January 1, 1968 and December 31, 1972.

Homer McK. Rees of White Weld & Co.

James D. Robinson of White Weld & Co.

The loan officer and the person in charge of records relating to the loans made by the following banks:

Chase Manhattan Bank (National Association)
Chemical Bank New York Trust Company
First National City Bank
Manufacturers Hanover Trust Company
Marine Midland Grace Trust Company of New York
Franklin National Bank
Security National Bank of Long Island

to Glen Alden Corporation between July 26, 1968 and June 17, 1971.

The partner or partners and associates of Fried, Frank, Harris, Shriver & Jacobson and Simpson, Thacher & Bartlett, responsible for the preparation of plaintiffs' exhibits hereinafter numbered "71" ,"76" and "77".

Stanley Shuman

Richard Graham

Alan C. Greenberg

Defendants reserve their right to examine any of the witnesses listed by plaintiffs. Irrespective of plaintiffs' list of witnesses, defendants may call:

Bernard Goldberg

David A. Chernow

Isidore Becker

Meshulam Riklis

Haskins & Sells

Stanley Shuman

John Vogelstein

VI Exhibits

The parties agree that exhibits bearing the letter "A" opposite their number may be received in evidence without objection. Within ten days after this order is signed, each party shall serve the other party with specific objections to the admissibility of the exhibits hereinbelow listed.

Plaintiffs' exhibits are:

Exhibit #
for identification

1. The Schenley Proxy Statement dated May 21, 1971
2. The Schenley Proxy Statement dated November 17, 1969
3. The Glen Alden Prospectus dated August 8, 1968
4. Preliminary Prospectus of Lorillard Corp. dated April 19, 1968
5. The Graham Report dated February 6, 1967
6. Affidavit of Alan C. Greenberg, sworn to May 2, 1968
7. Annual Report of Schenley Y/E 8/31/68
8. " " " " " 12/31/69
9. " " " " " 12/31/70
10. " " " " " 12/31/71
11. " " " " " 12/31/72
12. " " " " " January 31, 1974

12(a) Schenley 10-K 1971

12(b) Schenley 10-K 1972

13.	Schenley Profit & Loss, Balance Sheet Before Audit Reclassifications	12/31/68
14.	" " "	12/31/69
15.	" " "	12/31/70
16.	" " "	12/31/71
17.	" " "	12/31/72
17A	Schenley Quarterly Balance Sheets	
17B	Schenley Balance Sheet as of May 31, 1971	
18.	Schenley Budgets 1971 Budgets	
19.	" " 1972 Budgets	
20.	Schenley Summary Analysis of Operations Y/E	12/31/71
21.	" " " " "	12/31/72
22.	1971 Profit Plan Schenley only	

23. Reconciliation prepared by H. Baum
Domestic Sales Bulk Whiskey

24. Bulk Sales Per answers to Interrogatories in <u>Gibbons</u>
(2 pages)

25. Schedule of Bulk Sales June 1968- 12/31/71

26. Schedule of Domestic Bulk Whiskey Sales 1972

27. Canadian Schenley Direct Bulk Sales 1972

28. Canadian and Long John Bulk Sales 1968-1971

29. Letter from ST&B to SEC dated 6/8/71

30. Summary of Bulk in Bond Inventory
1968 through 1972 (Cole 14)

31. Inventory Blue Books, January 1, 1968, 1969, 1970, 1971

31(a) Inventory Blue Book, January 1, 1972

32. Inventory Blue Book, January 1, 1973

33. Schenley Summary of Inventory 1966-1972
(Cole 5)

34. Marketing Profit Summary, Whiskey Co's (Excl. Dreyfuss) By Product type for 1968, 1969, 1970 (Cole 16)

34(a) Same title as #34 for 1970 and 1969 and showing sales revenue and marketing profit

35. Brand Marketing Profit & Loss Statement 12 Months: ended 8/31/68 (Cole 16)

36. ended 12/31/69

37. ended 12/31/70

38. ended 12/31/71

39. ended 12/31/72

40. Canadian Schenley Distilleries Ltd. and Subsidiary Company Case sales by type 8/31/68, 12/31/69, 70, 71 and 72.

41. Long John Case Sales 8/31/68, 12/31/69 and 1971.

42. Dreyfuss Ashby & Co. Statement of P & L, 12 months ended 12/31/70

43. Case Sales by Type. Workpaper for page 45 5/21/71 Proxy Statement

44. Case Sales by Type 1966 - 1970 showing "Bulk Converted"

45. Distributorship Division - Cases Sold 1968-1971

46. Dewars Scotch, Case Sales, sales revenues, cost of sales, marketing profit

47. Dewars Scotch (Cole 18, 19, 23, 24)

48. Excerpt N. Y. Times 11/21/72 Re Isidor A. Becker Cole 1972

49. Affidavit of Stanley S. Shuman, sworn to June 7, 1971

50. Proxy Statement of Glen Alden and Rapid dated October 6,1972

51. Prospectus of Rapid dated October 19, 1971

52. Memo dated Aug. [illegible], 1970 William Shuster to Harold Morris (Cole 20)

53. Two page workpaper from Glen Alden "Cost of 6,887,089 shares of Schenley Common Stock".

54. Minutes of Executive Committee of B/D of Glen Alden (Cole 81)

55. Minutes of B/D Glen Alden (Cole 82)

56. Loan Agreement dated January 31, 1969 between Glen Alden and John Hancock Mutual Life Insurance Company ("Hancock Agreement")

57. Amendment to Hancock Agreement dated 5/14/70

58. Amendment to Hancock Agreement dated 12/1/69

59. Resolution of B/D of Glen Alden dated 1/27/71

60. Correspondence re Hancock Agreement

61. Loan agreements and amendments between Prudential Insurance Co. of America and Schenley ("Prudential Agreement") (Cole 84)

62. Correspondence re Prudential Agreement

63. Loan Agreement, amendments and correspondence between Schenley and Mellon National Bank & Trust Co.

64. Minutes of meeting of B/D of Schenley (Cole 46)

65. Schenley Common Stock Ratios 1961-1970 (Cole 76)

66. Buckingham - Financial Statements, 1968-4 mos. ended 4/30/71

67. "LJR Draft" - 2/11/71 Notice of Annual Meeting Stockholders

68. Letter dated March 26, 1971 from ST&B to SEC enclosing preliminary copies of Proxy Statement

69. Letter dated April 29, 1971 from SEC to ST&B

70. Letter dated May 7, 1971 from SSB to SEC

71. Printers Proof Proxy Statement dated March 6, 8, 10, 11, 19, 24, 1971 and printers proof bearing dates in April 1971, in the possession of Schenley

72. Glen Alden Long Term Notes and Debentures Payable Balance at 12/31/70 (Cole 95)

73. Federal Reserve, Monthly Chart Book, Sept. 1973

74. Forbes Magazine 3/15/71

75. Minutes of Schenley Board of Directors May 26 through November 20, 1969 (#24-4)

76. Printers Proof October 6, 1969 (Cole 47)

77. Printers Proof October 7, 1969 (Cole 48)

78. Loan agreements Glen Alden with ten named banks dated July 26, 1968 (Cole 56)

79. Loan agreements Glen Alden with ten named banks dated November 15, 1968

80. Affidavit of Homer McK. Rees - sworn to July 17, 1969 (Cole 53)

81. One page dated 3/31/71 - relating to "Cost Reduction Program" (attached to Cole 33)

82. Arthur Anderson & Co. ("A. & Co.") workpaper Comparison of Results of Operation Fiscal 1968 and Fiscal 1967 (Cole 91)

83. Breakdown of $6,316,000 used in Shuman aff'd p. 15 (Cole 87)

84. Joseph Gardner Workpaper -Neutral Grain Spirits 1969-1970

85. Opinion dated June 26, 1967 of A. & Co. with accompanying statement (Cole 92)

86. Workpapers of A. & Co. relating to preceding exhibit (Cole 92(a))

87. Haskins & Sells ("H & S") workpapers Extraordinary Items - 12/31/71 (Cole 59)

88. H & S Workpapers Used Cooperage (Cole 61)

89. H & S Workpapers - Valuation of Empty Barrels (Cole 62)

90. H & S Workpapers - Empty used wood activity 12/31/69 and Bulk Position at 12/31/69 (Cole 63)

91. H & S Workpapers - Used Barrel Disposals Fiscal 1968 (Cole 64)

92. H & S Workpapers - Neutral Grain Spirits Distilled from Corn Whiskey 12/31/69 (Cole 65)

93. Deposition of Joseph Lubin in Mathes, et al. v. Meshulam Riklis, et al.

94. Hearing before Referee Samuel A. Neuberger in Sanders v. Riklis.

95. Judgment and Order in Sanders v. Riklis.

96. H & S Workpapers Escrow account as of 12/31/71, Schenley liability to Minority Shareholders.

97. Letter dated December 15, 1971 from Glen Alden to SEC and reply of SEC to Glen Alden letter dated on or about January 5, 1972 (copies to be supplied by Glen Alden).

98. February 14, 1972 letter of FFHS & J to Judge Weinfeld.

99. Tender offer by Glen Alden dated October 8, 1971.

100. Complaint for injunction and judgment for permanent injunction in Securities and Exchange Commission v. Glen Alden Corporation, USDC, SDNY, both dated August 7, 1968.

101. Schenley's answers to Plaintiffs' Interrogatories 1, 2 and 3.

102. All printers proof in the possession of Fried, Frank, Harris, Shriver & Jacobson of the Schenley Proxy Statements dated November 17, 1969 and May 21, 1971.

103. H & S Workpapers - 1971 Schenley Interest Expense, Interest Expense-Net, Interest Income and Other Income.

104. H & S Workpapers - 1970 Schenley Interest Expense, Interest Expense-Net, Interest Income and Other Income.

105. Glen Alden answers to Plaintiffs' Interrogatories.

106. Excerpts from Federal Reserve Bulletins. Interest Rates (3 pages).

107. S & P Liquor Industry Survey dated July 25, 1971 and August 5, 1971.

108. Dow Jones Industrial - Monthly Closing Averages.

109. FFHS & J letter to HO - April 8, 1974.

110. " " " " - March 18, 1974.

111. Glen Alden Proxy Statement dated 5/19/72.

112. Transcript of Examination before trial of defendant Riklis in Gibbons action.

113. The report of Hayden, Stone, Inc. relating to 1972 merger of Rapid and Glen Alden.

114. Glen Alden 10-K, 1971

115. Letter dated October 10, 1969 from SSF & F to SEC with copy of proposed consent decree (Cole 52).

116. Letter dated November 18, 1969 - SSF & F to SEC.

117. Memorandum of Understanding, Schenley and Northwest dated October 30, 1970 (Cole 50).

118. Stock Purchase Agreement, Schenley and Northwest dated 5/10/71 (Cole 51).

119. Schedule Barrels on Hand on 1/1/68 and on 1/1/72 of New and Used Wood Spirits, Excluding Brandy, Light Whiskey, Neutral Grain Spirits, Gin, Rum and Scotch (Cole 29 corrected).

120. Kentucky New Wood On Hand and Depletions 1968 - 1971 (Cole 30 corrected).

121. H & S Workpapers December 31, 1968 Analytic Review (Cole 34).

122. H & S Workpapers Analytic Review September 30, 1969 9/30/69 & 9/30/68 (Cole 35).

123. H & S Workpapers Reserve for doubtful accounts Accounts Receivable Collectibility (Cole 36).

124. Summary of Inventories, Schenley Industries and Consolidated Companies 12/31/70 (Cole 38).

125. Alcoholic Beverages Executive Newsletter #16 18 3/19/71 (Cole 39).

126. Statistical Release IRS (Cole 40).

127. Number of listings by marketeers appearing on Table No. 2 (Cole 42).

128. H & S Workpapers - Cost of Inventories, Whiskey Utilization 12/31/68.

129. Used barrels exported yearly (Cole 60).

130. H & S Workpapers - Inventory Reserve Acct. 26.00 12/31/68 (Cole 67).

131. H & S Workpapers - Compliance with Glen Alden Corp. Loan Agreements dated July 26, 1968 and November 15, 1968 (Cole 58).

132. H & S Workpapers 12/31/69 Computation of Effect of changing barrel depreciation life (Cole 75).

133. H & S Workpapers - Direct cost of sales 12/31/69 (Cole 71).

134. H & S Workpapers - Inter-office communication re Change in Accounting Procedure 12/31/69 (Cole 72).

135. H & S Workpapers - Scotch Whiskey Sales Reserve 12/31/71 (Cole 73).

136. Journal Voucher 12/31/70.

137. H & S Workpapers - Other income and expense 12/31/71 (Cole 69).

Defendants' Exhibits are:

A. Market reports showing market prices of Schenley, Buckingham and BIM.

B. Press releases and public announcements re sale of Buckingham.

C. Papers submitted in connection with motion for preliminary injunction and application for reargument in Voege v. Becker, USDC, SDNY.

D. Papers submitted in connection with motion for preliminary injunction in Greene v. Schenley.

E. Papers submitted in connection with motion for temporary restraining order and transcript of hearing in Zisook v. Schenley, USDC, SDNY.

F. Defendants' Interrogatories and plaintiffs' original and amended responses thereto.

G. Letter dated January 14, 1972 with attachments and all other written communications from Schenley to parties in the Delaware appraisal proceedings.

On notice to the parties, at any time within thirty days before the scheduled trial commencement date portions of transcripts to depositions to be read at trial, witnesses or exhibits may be added to this Order without the Court's permission. Thereafter, an application must be made to the Court for permission to make such additions to this Pre-Trial Order. The application shall state the reasons why such additions were not set forth in this Pre-Trial Order.

Copies of all schedules, compilations or other written material containing financial, accounting or statistical information which any party intends to offer in evidence or use as an aid to or basis for the testimony of a witness, including an expert witness, shall be served on the other parties at least twenty (20) days before the scheduled trial commencement date. Written specific objections to the admissibility of any exhibits that may be added to this Order, as herein provided, shall be served within ten (10) days after the receipt of copies of such exhibits.

The parties hereby stipulate as follows:

(1) If signed copies of the transcripts of the depositions of defendants Chernow, Becker, Goldberg and Riklis have not been delivered to lead counsel for plaintiffs within thirty (30) days after this Order is signed, then the signing of those transcripts shall be deemed to have been waived;

(2) the deposition of defendant Riklis taken on August 28th and 29th, 1973, in E. F. Gibbon v.

Schenley Industries, Inc., Court of Chancery, Newcastle County, Delaware, Civil Action No. 3746, be deemed as though it were taken in the instant action;

(3) at least thirty (30) days before the scheduled trial commencement date the defendants shall serve upon plaintiffs' lead counsel answers to plaintiffs interrogatories relating to experts and plaintiffs may serve additional answers to defendants' interrogatories relating to experts.

VII

Plaintiffs contend that the issues to be tried are:

(a) The Proxy Statement.

1. In the respects set forth in SectionIV (A) and in plaintiffs' answers to defendants' interrogatories, did the Proxy Statement contain statements which, at the time and in the light of circumstances under which the same were made, were false or misleading with respect to a material fact, or which omitted to state a material fact, necessary in order to make the statements made therein not false or misleading?

2. Were members of the class injured by one or more of the misrepresentations or omissions to state a material fact?

3. What is the measure of damages to which members of the class are entitled?

4. Did defendants derive gain or profit from the reorganization for which they are required to account to the class?

(b) The 10(b) claims:

1. In the respects set forth in Section IV(B) and in plaintiffs' answers to defendants' interrogatories, did the defendants:

(a) employ any device, scheme or artifice to defraud; or

(b) make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading; or

(c) engage in any act, practice, course of business which operated or would operate as a fraud or deceit upon the Minority Stockholders in connection with the reorganization of Schenley?

2. Did the defendants know or should they have known that they committed any of the acts described in the preceding paragraph?

3. Were members of the class injured by any of the defendants' acts outlined in paragraph L?

4. What is the measure of damages which members of the class are entitled?

5. Did the defendants gain or profit from such acts for which they required to account to the class?

(c) The common law claim:

1. Was the reorganization authorized by the laws of the State of Delaware?

2. Were the terms of the reorganization fair and equitable to the Minority Stockholders?

3. Did Glen Alden or the directors of Schenley violate their fiduciary duties to the Minority Stockholders in fixing the terms of the reorganization?

4. What was the fair value of the Schenley shares on June 17, 1971, when the reorganization became effective?

5. What is the measure of damages to which members of the class are entitled?

6. Did Glen Alden or Schenley or both gain or profit from the reorganization for which they are required to account to the class?

Defendants contend the issues to be tried are:

1. Was the proxy statement materially false and misleading in violation of Section 14(a) of the Securities Exchange Act?

2. If the answer to question 1 is yes, what damages were caused to the plaintiffs by virtue thereof?

3. Can plaintiffs recover damages for an alleged fraud from which they benefited?

4. Were defendants participants in a scheme to depress the market price of Schenley stock?

5. Has there been a violation of Rule 10b-5 by any defendants in connection with the purchase or sale of

Schenley stock?

6. If the answer to questions 4 or 5 is yes, what damages were caused to the plaintiffs by virtue thereof?

7. Do plaintiffs state a claim for damages under the law of the State of Delaware?

8. If the answer to question 7 is yes:

(a) Does this Court have jurisdiction of such claim?

(b) Is such claim a proper class action?

The parties by their counsel hereby consent to the entry of this Pre-Trial Order.

Dated: New York, N. Y.
January 30, 1975

HERMAN ODELL
Lead Counsel for Plaintiffs

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
By:
Attorneys for Defendant Glen Alden Corporation

RUBIN, BAUM, LEVIN, CONSTANT & FRIEDMAN
By:
Attorneys for Defendants Rapid-American Corporation and Meshulam Riklis

MILTON B. SEASONWEIN
Attorney for Defendant Schenley Industries, Inc.

SIMPSON, THACHER & BARTLETT
By:
Attorneys for Defendants Isidore A. Becker, Bernard Goldberg, Paul A. Johnston, David A. Chernow, Walter O. Heinze, Howard Feldman, Milo B. Hopkins, Russell G. Smith and Albert N. Greenfield

SO ORDERED

U.S.D.J.

attributable to defendants Rubin and Berman lacked the scienter necessary for a finding of liability. The conduct of defendants Rubin and Berman was neither intended to deceive nor was it so reckless as to be virtually indistinguishable in its culpability from deliberate fraud.

* * * [Discussion of state law claims omitted. CCH.]

[¶ 95,765] Cole, et al. v. Schenley Industries, Inc., et al.

United States District Court, Southern District of New York. Nos. 71 Civ. 1028, 1042, 1284, 1536, 2605. November 24, 1976. Opinion in full text.

Exchange Act—Proxy Statement—False and Misleading—Merger—Excess Cash.—An issuer was not required to make a three year comparison of its cash position in its proxy statement, rather than the two year comparison required by the rules under the Securities Exchange Act, since the disclosure was otherwise adequate. The proxy statement fully revealed that the company had substantial cash and that the sale of a subsidiary was the major source of its "cash rich" position. Likewise, the proxy statement adequately disclosed the amounts of money that were to be transferred to a purchasing corporation for the purchase of debentures to be issued to minority shareholders upon consummation of the reorganization. The company was not required to denominate a sum as "excess cash," since it was clear from the proxy statement that the company was proposing to transfer money out of the corporation.

See ¶ 24,013, "Exchange Act—Proxies" division, Volume 2.

Exchange Act—Antifraud—Merger—Corporate Purpose.—A merger did not violate the antifraud provisions of the Securities Exchange Act since shareholders were given a chance to seek injunctive relief, claims of gross unfairness were rejected by the courts, and the corporate purpose of simplification of corporate structure under changing business and credit conditions was established. Also, the shareholders had an opportunity to invest in stock in the combined entity.

See ¶ 22,721 and 22,725, "Exchange Act—Manipulations; National Market System" division, Volume 2.

OWEN, District Judge: This is an action brought on behalf of former shareholders of Schenley Industries, Inc. ("Schenley") with respect to the merger of June 17, 1971 whereby Schenley became a wholly owned subsidiary of Glen Alden Corporation ("Glen Alden"). The main attack of the plaintiffs is upon the proxy statement of May 21, 1971, issued in connection with the upcoming merger, which is alleged to have been materially false and misleading.

The plaintiffs' case basically is founded upon a single fact nucleus, to wit, that Schenley possessed large amounts of what plaintiffs would define and would require management to define as "surplus" or "excess" cash; that this "information" (or "definition") was of importance to the shareholders and that the proxy statement failed to make adequate disclosure about such "excess" cash.

There is no question that Schenley was a "cash rich company" at the time of the proxy statement. The facts about its cash position and the sources of the growth of Schenley's cash were adequately disclosed and are not in dispute. What *is* in dispute is (1) whether or not the proxy statement wrongfully failed to compare Schenley's cash position on May 31, 1971 with its cash position exactly three years earlier; (2) whether the proxy statement wrongfully failed to disclose the extent of the proposed use of Schenley's cash upon consummation of the merger, and (3) whether the proxy statement wrongfully failed to *state* that Schenley had approximately $140,000,000 in "excess cash." What plaintiffs' claim comes down to in the final analysis is whether or not Schenley was required to characterize certain facts in a particular way, notwithstanding that they were otherwise essentially disclosed in the proxy statement.

At all times herein involved, Schenley was in the primary business of manufacturing, importing and selling distilled spirits. Until the time of the merger the common and $1.40 preferred stock of Schenley were listed and traded on the New York Stock Exchange.

Starting some time in 1967, Glen Alden was involved in a bidding contest for control of Schenley. In March 1968 Glen Alden purchased 18% of Schenley's common stock from Lewis S. Rosenstiel, the founder and chairman of the board of Schenley. Subsequently, in August 1968, Glen Alden made an exchange offer to all stockholders of Schenley. As a result of this offer, Glen Alden became the holder of approximately 88% of the common stock of Schenley.

Since 1964 Schenley had owned 52.7% of the stock of the Buckingham Corporation ("Buckingham") whose sole business was the importation and sale of Cutty Sark scotch whiskey. As a result of the merger in 1969, Schenley became the owner of all of the stock of Buckingham. Former stockholders of Buckingham received $1.40 preferred stock of Schenley which was convertible into 9/10 of a share of Schenley common stock. These preferred stockholders make up approximately ⅔ of the plaintiff class in this action.

As a result of a consent decree in an antitrust action, Schenley was compelled to divest itself of Buckingham. In October 1970 Schenley announced the proposed sale of Buckingham to Northwest Industries for approximately $120,000,000. The sale was effectuated in May 1971.

On February 25, 1971, Glen Alden announced the terms of the proposed merger with Schenley, to wit, $5 in cash and a $30 face amount 7½% debenture for each share of Schenley common stock, and $4.50 in cash and a $27 face amount 7½% debenture for each share of preferred. Glen Alden had, and announced that it had, sufficient voting power to ensure the consummation of the merger. This package, it is undisputed, had a fair market value of $29 per share for common stock and $26.10 for preferred. This consideration represented a price in excess of the market price of Schenley stock for almost two years (and higher than the market price at any point for ten years except during the bidding contest for control of Schenley) and greater than the market price of Buckingham for over five years.

Several lawsuits were thereupon commenced by stockholders attacking the merger. Three applications were made to enjoin the merger; two by the plaintiffs (Voege and Zisook) in the instant action and one in the Chancery Court of Delaware. All three applications were denied.

Subsequent to the consummation of the merger, statutory appraisal proceedings were commenced in the Chancery Court, and a decision rendered in May 1975.[1]

While there was a dispute arising on the trial as to whether Schenley's cash position[2] at the time of the proxy statement was $162,000,000, as contended by Schenley, or $191,000,000, as contended by plaintiffs,[3] the sources of the improvement in the company's cash position was fully revealed. These sources were the sale of Buckingham, an increase in net worth resulting from operating earnings after the payment of dividends, certain cash held by Buckingham prior to the time it became a wholly owned subsidiary of Schenley's, and the reduction of inventory.

Plaintiffs' next claim is that there should have been a three year comparison of Schenley's cash position rather than the two year comparison required by the rules of the SEC. The law does not require this so long as the disclosure is otherwise adequate, which here it was. *Corenco v. Schiavone Sons, Inc.*, CCH Fed. Sec. L. Rep. ¶ 94,220 (S. D. N. Y. 1973). The proxy statement fully reveals that Schenley had substantial cash, that the sale of Buckingham was the major source of its "cash rich" position, that its net worth had increased over several years, that its inventories had been reduced, and that Schenley had complete control over the cash previously owned by Buckingham.

Plaintiffs next contention is that there was an inadequate disclosure of the amounts

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[1] *Gibbons v. Schenley*, Civ. No. 3746. I note that the claimants in *Gibbons*, as did the plaintiffs here, placed particular emphasis upon the so-called "asset value" of Schenley. The Court, however, refused to give any weight to "asset value," noting.

"[t]he investing and trading public, in reaching a judgment as to the value of corporate shares, gives consideration to corporate assets only insofar as they disclose a capability of generating earnings, a judgment exercised here. . . ."

The Court also cited Graham, Dodd, Cottle & Tatham. *Securities Analysis*, p. 519 for the proposition that cash assets bring in little or no earnings.

[2] The term "cash position" here includes cash, certificates of deposit and marketable securities.

[3] The difference is not of consequence to the determination herein and appears to be based upon the use by plaintiffs of a post proxy unaudited balance sheet which does not contain such offsets as amounts for tax liability or required debt repayment.

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of money that was to be transferred by Schenley to Glen Alden upon consummation of the reorganization. Keeping in mind that Schenley's net from the Buckingham sale was approximately $114,000,000, and that in connection with the merger, Schenley would purchase from Glen Alden the debentures to be issued to the minority shareholders accepting the merger, I conclude that the proxy language that Schenley would transfer to Glen Alden "a *substantial* portion of the proceeds" of the Buckingham sale, adequately met the need to advise a reader of the proxy statement of the considerable funds that would be transferred. The exact amount, obviously, was uncertain. An unknown number of shareholders would surely reject the proposal and seek appraisal, leaving Schenley unsure beforehand whether the amount would be $81,000,000 or $61,000,000 or, as it turned out as of the time of trial, some having withdrawn from the appraisal proceedings, $75,000,000. There is no question that a reader of the proxy statement knew [illegible] debentures would be purchased from [illegible] Alden for issuance to minority share[illegible]ers. The purchase price and the total [illegible]nber of such shareholders were fully disclosed, setting an outside limit. Indeed, plaintiffs' claim on the trial of inadequate disclosure and doubts as to just how *large* the transfer would be is undercut by statements these very plaintiffs or their representatives made in seeking to enjoin the merger, at which time plaintiffs concluded that even more money was to be transferred than was in fact transferred.[4] Plaintiffs' reliance on *Feit v. Leasco*, 332 F. Supp. 544 (E. D. N. Y. 1971) is, in my opinion, misplaced. There the court stated in the opening paragraph of its lengthy opinion:

> Defendants' registration statement was, we find, misleading in a material way. While disclosing masses of facts and figures, it failed to reveal one critical consideration that weighed heavily with those responsible for the issue—the substantial possibility of being able to gain control of some hundred million dollars of assets not required for operating the business being acquired.

Without having to discuss the fact that *Feit* involved an insurance company and the unique problems there involved with the lack of the company's ability to use in any way what is defined in the insurance field as "surplus surplus," funds distinguishable from a business corporation's use of any of its assets, it is clear from *Feit* that there was no disclosure of the existance of unusable cash constituting "surplus surplus," whereas in the instant case, it is perfectly apparent from the proxy statement that a major independent self-sustaining asset of Schenley's (the Buckingham distilling operation) had been sold, and the proceeds now existed in cash, subject to any appropriate use management might have for it. These facts were fully disclosed.

Next, plaintiffs contend that some sum should have been denominated "excess cash," being that which plaintiffs would define as that cash not needed in the day-to-day operation of Schenley. Again, however, this is merely a question of definition, for it is perfectly clear from the proxy statement that by proposing to transfer money out of the corporation, that determination had been made by management and was being communicated in the proxy statement. What need, therefore, to give that the label the plaintiffs are here demanding? Further, plaintiffs own expert agreed that the word "excess" was merely a label in acknowledging that he would *not* apply the word "excess" to any sums, regardless of their proposed use, which management, in good faith, felt was necessary in the overall business of a company.

This case is not to be decided upon a choice of words, so long as the facts themselves are adequately stated for the reader to see. *Abramson v. Nytronics, Inc.*, 312 F. Supp. 519 (S. D. N. Y. 1970).

Finally, plaintiffs argue that *Marshel v. AFW Fabrics*, 533 F. 2d 1277 (2d Cir. 1976), and *Green v. Sante Fe Industries, Inc.*, 533 F. 2d 1283 (2d Cir. 1976), *cert. granted*, 45 U. S. L. W. 3249 (U. S. Oct. 5, 1976), decided subsequent to the taking of testimony herein require a determination in their favor. I find plaintiffs' position to be without merit. Unlike *Marshel* (which arose on an application for a preliminary injunction), the instant situation was hardly a scheme by Glen Alden "having previously taken advantage of public financing to appropriate for [its] benefit the entire stock ownership . . . ." In addition, the shareholders in the instant case, unlike *Marshel*, had an opportunity to invest in stock in the combined entity.

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[4] Various of plaintiffs' representatives asserted sums variously estimated as $155,000,000 up to $200,000,000.

Further, *Green* declares it to be a violation of 10b-5 only when three conditions exist: (1) a lack of notice to shareholders precluding an opportunity for injunctive relief, (2) gross unfairness, and (3) lack of corporate purpose. None of these are present here. Three attempts were made and rejected by various courts (see *supra*) to enjoin the merger; claims of gross unfairness were rejected by both this Court and the Delaware Chancery Court; and the corporate purpose, i.e., simplification of corporate structure under changing business and credit conditions, was established on this record. Plaintiffs' attack based upon *Marshel* and *Green* is rejected.

A final minor attack herein is as follows: by an agreement in March 1968, Glen Alden acquired certain shares of Schenley common stock from Louis N. Rosensteil and others. The purchase price was 53.33⅓ per share in an arm's length transaction. In order to avoid possible future litigation, arguably involving the claim that this was a sale solely for control by insiders, the agreement also provided that it was the intention of the parties that the other holders of Schenley common would be afforded an opportunity to sell their shares for a total consideration comparable to or more favorable than that paid to the Rosensteil group. Certain plaintiffs herein contend that this established a third party beneficiary claim on behalf of all other stockholders which was still viable at the time of the merger over three years later. Judge Lasker, presented with the same facts, denied a preliminary injunction, pointing out that whatever validity the plaintiffs' arguments might have had at an earlier time, with the passage of time there had been "substantial changes in the business affairs of Schenley since those days." Obviously, no shareholder had a vested right to the same consideration as Mr. Rosensteil *ad infinitum*. Nothing new has been presented to me to cause me to view this matter differently. Since the Rosensteil sale, Buckingham was sold and there have been other substantial changes in the business affairs of Schenley.

Given all the foregoing, Count 1 is dismissed for failure of proof, Count 2 was withdrawn upon the trial, Counts 4 and 5 were not pursued upon the trial and are dismissed, and Count 3 is dismissed upon the law and the facts.

The foregoing constitutes the Court's findings of fact and conclusions of law.

Submit judgment on reasonable notice.

[¶ 95,766] Rosen v. Drisler, et al.

United States District Court, Southern District of New York. 73 Civ. 3367. October 21, 1976. Opinion in full text.

Exchange Act—Insiders Trading—Cancellation of Stock Options.—An issuer's purchase of stock option rights from corporate insiders more than six months after their grant does not result in the realization of short-swing profits within the scope of Section 16(b) of the Securities Exchange Act. The option cancellations were not merely shams designed to disguise what in reality were purchases and resales of the stock involved. Each was a bona fide surrender of stock option rights to the issuer, entered into in lieu of the alternative of an exercise of the option followed by sale of the stock. The test is "whether or not the transaction in question could possibly lend itself to the types of speculative abuse that the statute was designed to prevent." The defendants realized profits as long-term holders of the options taking advantage of the corporation's desire to remove from their hands the ability to acquire substantial amounts of voting stock, and not of an opportunity afforded them as insiders to realize profits through a short-term swing in investment position. The "buy-outs" involved a single instantaneous transaction presenting no opportunity for speculation.

See ¶ 26,081, "Exchange Act—Insiders; Recordkeeping; Clearance & Transfer" division, Volume 3.

Exchange Act—Antifraud—Proxy Rules—Purchase of Stock Option Rights by Issuer.—The absence of some form of deception or nondisclosure was fatal to a shareholder's derivative action alleging that the board of directors violated the antifraud provisions of the Securities Exchange Act by permitting the corporation to purchase option rights from corporate officers. Since the proxy statement did not solicit any shareholder votes in connection with the challenged transactions, the alleged fraud in connection with the statement could not supply such nondisclosure.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID BECKER and MARGARET B. LEDDER, Plaintiffs,	:	
- against-	:	NOTICE OF APPEAL
SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION, Defendants.	:	No. 72 Civ. 2370

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NOTICE IS HEREBY GIVEN that DAVID BECKER and MARGARET B. LEDDER, plaintiffs in the above entitled action, hereby appeal to the United States Court of Appeals for the Second Circuit from the following orders entered in this cause by the United States District Court for the Southern District of New York:

1. Judgment order entered January 24, 1977, dismissing the above entitled action.

2. Memorandum Opinion and Order on Class Certification, entered September 19, 1975, denying plaintiffs' motion for class action certification.

3. Order entered January 14, 1977, denying plaintiffs' renewed motion for class action determination.

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